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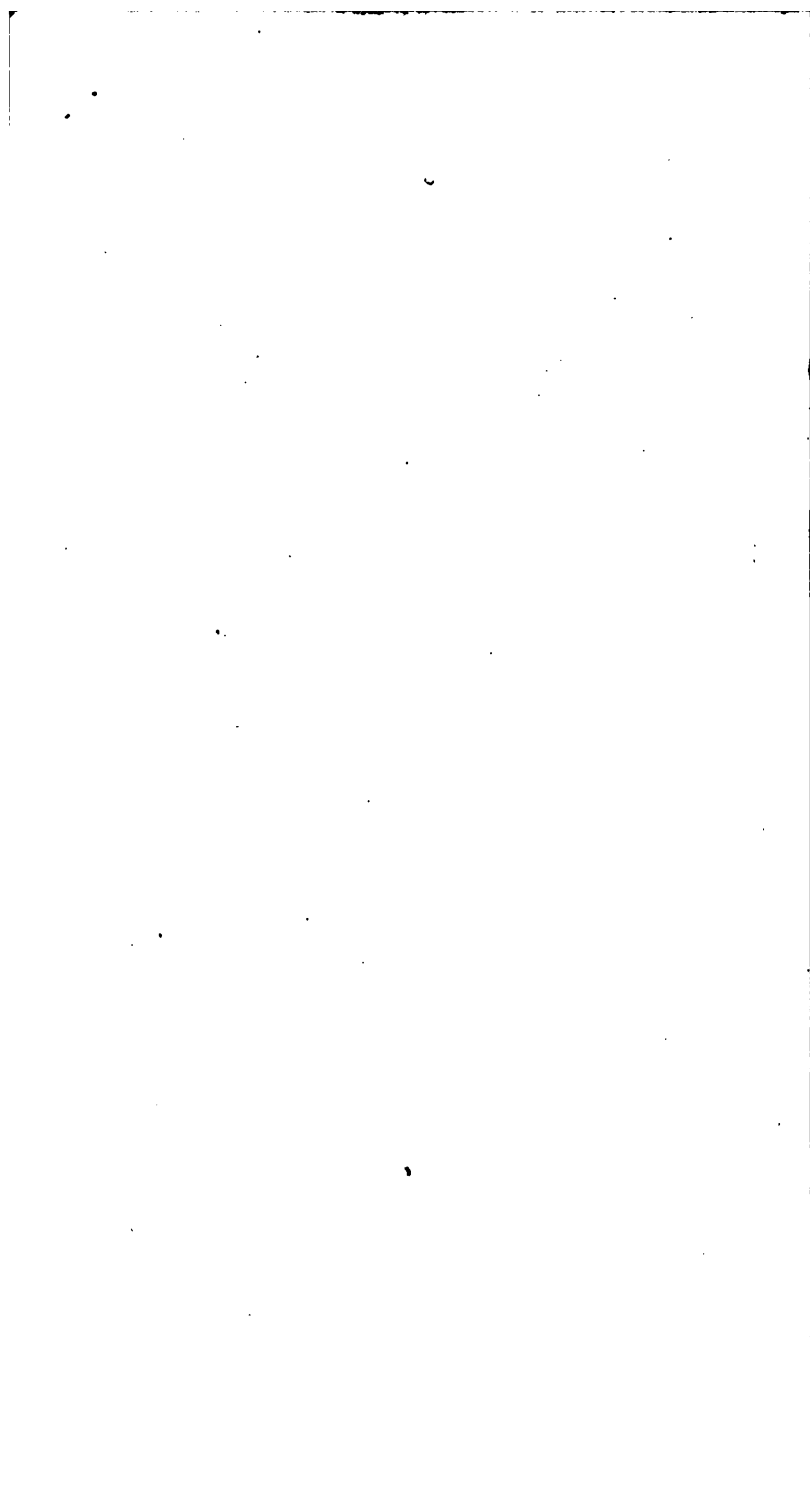


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A
MANUAL OF CIVIL LAW;

OR,

EXAMINATION IN THE

Institutes of Justinian:

BEING A

TRANSLATION OF AND COMMENTARY ON THAT WORK,

WITH AN INTRODUCTION ON

The History of the Roman Law.

BY

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P R E F A C E.



It is certainly a remarkable circumstance, that notwithstanding the many illustrious civilians which this country has produced, there should exist so few elementary works on the subject of Civil Law in the English language (1). To supply this defect has been the author's object throughout the following pages; and for this purpose he has had recourse to the French Manual of Civil Law by Lagrange, which has already reached six editions, and is understood to be used by French students as their ordinary text-book. Perhaps the author might have contented himself with a mere translation; but as he proceeded with his task he seemed to find occasional defects and obscurities which he hoped to remedy. Using, therefore, the Manual in question as a foundation, and retaining the form of question and answer, he has diligently consulted the original Institutes of Justinian and Gaius, the Digest and Code, and particularly the Commentaries of Ortolan and Ducaurroy—works which exhibit a precise elegance of language, a power of analysis, and a lucidity of arrangement probably unsurpassed.

(1) Besides Mr. Phillimore's "Introduction to the Study of Roman Law," we may mention, that Mr. Sanders, late Fellow of Oriol, has published an edition of the "Institutes of Justinian," which is excellent, particularly the Translation and Introduction.

Out of these materials he has constructed the following work, which is intended as a *Translation* of and *Commentary* on the "Institutes of Justinian." The most ample use has been made of Gaius and the other authorities; but Justinian's arrangement has been strictly adhered to, so far at least as the Books and Titles are concerned,—though the Paragraphs have in some cases been altered, for the sake of clearer arrangement. The numbers prefixed to each answer indicate the paragraphs of the text which are the subject of explanation. Although, for the purpose of understanding these pages, it is by no means necessary to consult the original,—for the more remarkable Latin expressions have been carefully selected and embodied in the work,—nevertheless the student will probably find it convenient to do so.

It remains only to add, that the Introduction is intended to furnish such information on the history of Roman law as may be found useful; and that a Table of Contents has been thought superfluous, the Index being so ample.

INTRODUCTION.

THE law of a people is so completely the expression and result of its civilization, that to be studied with success it must be studied historically. This is especially true of Roman law: for the *Corpus juris civilis*, which must be regarded as a code, and studied as our text-book, is essentially an historical document; nor can its contents be elucidated without recurring to the foundation of the city. In short, the law of Justinian's time is not a body of regulations drawn up by a philosophic legislator, but a heterogeneous mass of positive rules and legal principles originating in custom and enactment, modified, no doubt, by the spirit of civilization, and interpreted according to the maxims of convenience, sanctioned by judicial authority.

Obscure as we must admit the origin of Rome to be, thus much is clear, that it was a compound of various elements. The Roman state—*Populus Romanus Quirites*—consisted of three tribes: the Romans, Pelasgians, under Romulus, the Tities, Sabines, under Tatius, and the Luceres, probably Etruscans, under Lucumo. These three tribes were divided each into ten *curiæ*; each *curia* into several *gentes* or clans; and each *gens* into several *familie* or families. But the family was the primary element of the state. No one could be a full member of the state unless he was a member of a family; and to maintain the purity of this exclusive family-system was an object of the most anxious solicitude. Each family, each *gens*, each *curia* had its own sacred rights (1), in which none but mem-

(1) Each family, and each *gens*, had its *sacra privata*; each *curia* and each tribe, its *sacra publica*; but, besides these, there were certain sacred rights appropriate to almost every event, whether in public or private life; whether, for instance, war was to be declared, or a treaty concluded, or a marriage celebrated, or a child

bers could participate, and to which none could be admitted except by birth or by a special law: by birth, when a person was sprung from a marriage contracted between two members of a *gens*, under the form of *confarreatio*; by a law, when the assembly of the people allowed the member of one family to enter another, or, for the first time, introduced into the state one not already a citizen. Moreover, the property of the individual member of a *gens* was regarded as in some sort the property of the body—hence the claim of the *gentiles* to succeed in certain events, and the necessity for a special law in order to sanction a testament by which the ordinary rules of succession would be altered.—The tribes met together in a public assembly, the *comitia curiata*, to which all members of the *curiæ*, but none except members, were admitted. Here the king was elected and clothed with the *imperium*, the supreme judicial and military power: here he brought forward his proposals (*ferre legem*), which, if sanctioned, became law (*lex*): here also *adoptions* and testaments were authorized.—The king, it may be observed, was assisted by his senate or council of the chief citizens.—Now these members of the *curiæ* were the original *Patricians*, the perfect citizens, *cives optimo jure*.

But beside this privileged caste there existed another body of citizens, the *Plebeians*, who, though probably sprung from the same origin, were excluded from all political power. These men, who must not be confounded with the mere rabble, consisted of the inhabitants of the conquered districts around Rome, who had been transplanted to that city. But they belonged to no *gens*, to no family; they had therefore no right to participate in the *jus sacrum*; they could contract no lawful marriage with a patrician; they could claim no vote in the *comitia*. In short, they had no political rights, and no means of ac-

adopted. Now, the whole body of rules on these subjects constituted the *jus sacrum*, which was administered by various officers, *pontifices*, *augurs*, *seciales*, *flamines*, *vestals*. But the remarkable thing is, that the priesthood at Rome was not confined to a particular caste: it was open to all the members of the *curiæ* (the patricians), and in later times to the plebeians also; nor, indeed, if we consider the influence of superstition and the power of a priesthood, is it difficult to understand the eagerness of the most eminent men of Rome to fill these offices.—The king, as *Pontifex Maximus*, published certain *leges regiæ*, which were collected by Papirius, in the time of Tarquinius Superbus.

quiring them. Nevertheless they were citizens (*cives*), for they had the *jus quiritium*, but *cives—non optimo jure*.

The Roman state (*civitas*), therefore, was a body of persons enjoying privileges from which all except members (1) were excluded, and these members were divided into two classes: they were either *cives optimo jure* or *cives non optimo jure*. The former had the *jus suffragii*, the right to vote in the *comitia*; the *jus honorum*, the right to fill public offices; and the *jus connubii*, the right of intermarriage. The latter had none of these rights. But as early as B. C. 445 the *lex Canuleia* invested them with the *jus connubii*, and in course of time, or we may say after the *lex Hortensia*, B. C. 286, the distinction between the plebeians and the patricians ceased.

From the earliest period, however, both classes of *cives*—patricians as well as plebeians—shared the *jus quiritium*. This right was twofold: it involved the power of the *manus*, and the right of acquiring property, the *jus commercii*.—Amongst a predatory tribe like the early Romans, nothing would more vividly represent the right of property, than the right of a conqueror over the spoils of war; hence the term for property *mancipia* (*manu capta*), things taken by the hand of power. Now, these *mancipia*—and this is the important point—included not merely inanimate Things, but animate Things—the members of a man's family. A Roman *pater-familias*, or head of a family, had absolute power over his wife and children, so that he might sell them, or even put them to death. They were *in manu*, in his hand, and part of his property. But further, as none but a Roman citizen could have any property at all, so there were certain things, viz., land, being part of the *ager Romanus* (Roman territory), *filii-f.*, and certain other specified chattels (p. 77), in which property could be acquired by *mancipatio* only—a solemn sale, before witnesses, with the brass and balance (2). These things were termed *res mancipi*, from the mode of transfer used; he who acquired was said to have the *jus commercii*; and the property so acquired was property *ex jure quiritium*. Now such being the only property recognised by the law, and the sons and daughters of a Roman being regarded as Things, it is ob-

(1) The rest of the world were *hostes, peregrini*.

(2) When the art of writing is unknown, witnesses and elaborate ceremonies are the only means of commemorating important facts, such as the ownership and transfer of property.

vious how marriage came to be the sale of a daughter to her husband, how an adoption came to be the sale of a natural to an adopted father, and how a testament came to be the sale of an inheritance.

But there was one species of property which the plebeians could not acquire, and which the patricians reserved for themselves, *viz.*, a share in the *ager publicus*. This was the public domain land which had been acquired by conquest, and for which the plebeians, as well as the patricians—for both served in the ranks of the army—had sacrificed their blood and treasure. But the patricians alone occupied it at a fixed annual rent which they paid to the state—the plebeians were totally excluded, and, we may add, that the great object of the various agrarian laws from the time of Spurius Cassius, B. C. 486 to that of Cæsar, was to remedy this gross injustice.

These invidious distinctions, however, between the patrician and the plebeian could not be maintained for ever. Step by step the plebeians vindicated for themselves equal rights with their fellow citizens.

To trace these changes would be to write the history of Rome. Suffice it to say, that as Rome advanced her standard, equal rights were extended, first to the inhabitants of the city, then to certain *municipia* and *colonies* in Italy, and lastly to the provinces beyond.—Connected with this we cannot overlook the distinction between the *jus latinum* and the *jus italicum*. In Italy, before the social war (B. C. 90), there were certain *municipia* and *colonies* which had no privileges, either political or civil: they were in fact *peregrini*; but there were others, the inhabitants of which, like the *Latini*, enjoyed the *jus commercii*, and in some cases the *jus connubii*, in other words, who had civil, not political, privileges (*civitas absque suffragio*). These were said to have the *jus latinum*. But after the social war, and the Julian and Plautian laws (B. C. 90—88), the inhabitants of the Italian *colonies* and *municipia* obtained full citizenship, and the right of voting; Rome became the mere capital of Italy, and the *jus italicum* was law throughout the peninsula; now this *jus italicum* implied, besides the *jus commercii*, municipal self-government and freedom from direct taxation (1). Beyond Italy specified places enjoyed

(1) The importance of these distinctions between citizens ceased, of course, after the time of Justinian, when all free inhabitants of the empire became Roman citizens.

these privileges, but they were not yet extended to the provinces generally, which in the mean time remained subject to a pro-consul or pro-prætor, and paid taxes to the Roman treasury.

Under Diocletian and Constantine, however, the Roman empire was re-organized. It was divided into præfectures, each under a *prætorian præfect*; each præfecture was divided into several dioceses under a *vicarius*, and each diocese was divided into various provinces under a president (*præses, rector*). The cities in the provinces were governed by a senate, *curia*, or *ordo decurionum*; besides which Valentinian instituted the *defensores civitatis*, whose duty it was to stand between the burghers and the oppression of the imperial government. In some cases these *defensores* had a jurisdiction up to 50 solidi, which Justinian raised to 300. An appeal lay to the *præses*. Moreover, the *defensor* had power to nominate tutors, and to register certain solemn acts, *donationes*, and *testaments*. Lastly, they exercised a criminal jurisdiction over minor offences.

Having made these general observations, we have now to explain very briefly the various sources of law to be met with in the *Corpus juris civilis*, of which we shall notice seven, and to give a slight sketch of Justinian's legal reforms.

1. *Leges*. The original assembly of citizens at Rome was the *comitia curiata*; but this patrician assembly was soon replaced by the *comitia centuriata* of Servius Tullius, in which the patricians and plebeians met together, and in which the right of voting was allowed according to a property qualification. In this *comitia* those *leges*, or laws, were passed which are mentioned as one of the sources of law; criminals were tried, and magistrates were nominated. At first its enactments required the sanction of the *comitia curiata*: but when that necessity ceased, the *curiæ* were only summoned for the transaction of certain formal business, such as *adoptions, adrogations*, and the making of testaments.

2. *Plebiscita*. This *comitia centuriata* was succeeded by the *comitia tributa*, in which the voter, instead of claiming his right by a property qualification, claimed it by residing within a particular district. The bills passed by the *comitia tributa* originally bound none but the plebeians, hence their name *Plebiscita*; but in the year 286 B. C. the *lex Hortensia* made them binding on all Roman citizens.

3. *Senatus-consulta*. The other legislative body was the

senate. Under the kings this royal council was composed of the wealthiest and most illustrious patricians. Until the close of the republic, it does not appear to have had the direct power of enacting laws; nevertheless, its orders issued to magistrates bound those subject to their jurisdiction. Moreover it exercised a dispensing power with respect to individuals, and even made additions to certain laws; but in general its functions were more administrative than legislative. But from the time of Augustus, the *senatus-consulta*, or ordinances of the senate, became a fruitful source of law: thenceforward, till the time of Severus, A. D. 222, they are numerous. After Hadrian's time it became usual to add to a *Sc.* the formula *Auctore D. Hadriano*, which shows the dependence of the senate on the emperor.

4. *The Twelve Tables.* Just laws are vain unless they are justly administered. At Rome the patricians, the avowed rivals and foiled oppressors of the plebeians, administered justice; so that the motives and facilities for its perversion are obvious. Moreover, as the law consisted merely of a body of rules, embodied in tradition, and ascertained by custom, the urgent desire of the plebeians to have a written code (*scriptæ leges*) is easily appreciated. But besides this, it seems to be generally admitted that one, if not the chief, object of a new code was to amalgamate the orders of patricians and plebeians, by assimilating the legal rights of both. After various unsuccessful attempts, an embassy was at length dispatched to Greece, B. C. 454, to obtain whatever information it could as to the practical working of the laws of Solon, and, having returned, the commission called *decemviri* drew up ten *tabulæ*, which was followed next year by two more, all of which were engraved, and hung up in the forum for the public information. These laws, the *Duodecim Tabulæ* (a few fragments of which have descended to our times) formed the basis of Roman law till the times of Justinian; and if we may at all regard the testimony of Cicero, it seems impossible to exaggerate their importance. They settled all the most important rights of a Roman citizen: the mode of suing; the penalties for theft; the rate of interest, which was not to exceed *fenus unciarium* (8½ p. c. for 10 months); the rights of creditors over their debtors; the power of a *pater-familias*; the making of wills (p. 119); the rules as to succession (*hereditas*), guardianship (*tutela*), ownership (*dominium*), and possession; *delicta*; breaches of trust; *prædia rustica*; the common rights of the people, forbidding

special privileges; the punishment of corrupt judges; trials as to life, liberty, or *status*; the expenses of funerals, and the mode of interment; the *jus sacrum*; and marriage and divorce, prohibiting intermarriage between patricians and plebeians.

5. *Responsa Prudentum*. But the Twelve Tables required an interpreter. Being the mere record of customs already known, and in living force at the time, they were laconic in expression and left much to construction. At first the patricians undertook this necessary office, because they alone were instructed in the forms of the *legis actiones*, which were absolutely essential to set the law in motion, and the *dies fasti* and *nefasti*, or proper times for instituting proceedings. But, in the year B. C. 312, Cn. Flavius, a scribe, published a calendar in which all the *dies fasti* and *nefasti* were marked, and a collection of the formulæ of the *legis actiones*. Thenceforth the monopoly enjoyed by the patricians declined: and this change was completed when T. Coruncanus, the first plebeian Pontifex Maximus, B. C. 281, introduced the practice of giving legal advice. Others followed his example, and hence arose the *jurisprudentes* or *jurisperiti*, who walked the forum and acted as advocates. They accompanied their clients to the magistrate, and stated their opinions as to the law; and these opinions, according to their soundness and ingenuity, naturally obtained the force of law. Such was the origin of that branch of Roman jurisprudence, which was sometimes called *jus receptum*, or *sententiæ receptæ*, or *jus civile* (1), because, no doubt, it was a development of the principles laid down in the Twelve Tables.

Augustus, however, was the first who gave these opinions legal authority, though Hadrian afterwards defined that authority differently (p. 6). Subsequently Theodosius II., by a Constitution dated A. D. 426, declared that a judge should decide according to the majority of the great jurists Gaius, Papinian, Ulpian, Paul, Modestinus; and that if there was an equal division of opinion Papinian should decide, but that if there was none, the judge should decide for himself.—Though there had always been differences of opinion upon various points among Roman jurists, it is not until the reign of Augustus that we find these differences.

(1) *Jus civile* denotes: 1. The law of a particular state, as opposed to the *jus gentium*; 2. All Roman law except the *prætorian law*; 3. The *responsa prudentum* alone.

so far developed as to have given rise to two great schools of Roman law—the Sabinians and the Proculians. The former derived their name from Sabinus, a disciple of Ateius Capito, who flourished under Augustus; the latter from Proculus, a disciple of Antistius Labeo, who lived about the same time. Labeo, imbued with the principles of a liberal philosophy, endeavoured to enlarge the principles of Roman law, whilst Proculus adhered with scrupulous fidelity to the legal doctrines as they had been handed down to him. These schools survived till the time of the Antonines, for Gaius, who wrote under them, declares himself a Sabinian. From the beginning of the Empire, therefore, to the time of Justinian, may be taken as the most important period in the history of Roman law—a period during which that noble system was gradually moulded and matured by the sagacious ingenuity of such men as Gaius, Papinian, Paul, Ulpian, and Modestinus—the five great Roman jurists.—Gaius was probably born in Hadrian's reign, A. D. 117, and wrote under the Antonines. Besides his Commentary on the Twelve Tables and the *edictum provinciale*, he wrote the Institutes. This work was lost until Niebuhr, in 1816, discovered it in the library of the chapter of Verona, the manuscript having been written over with the letters of St. Jerome.—Æmilianus Papinianus was the prætorian prefect of Septimius Severus, A. D. 193—211. He was executed by Caracalla. Papinian was the greatest of all the jurists.—Paul, Ulpian, and Modestinus were all pupils of Papinian. Julius Paulus was a member of the imperial council, and prætorian prefect under Alexander Severus (A. D. 222).—Domitius Ulpianus was from Tyre, in Phœnicia. He wrote under Septimius Severus and Caracalla, and was slain (A. D. 228) by the soldiers before the eyes of A. Severus. He was prætorian prefect at his death, and the Digest is full of extracts from his works.—Herennius Modestinus, the pupil of Ulpian and Papinian, was a member of the imperial council in the time of A. Severus, but very little is known of him.

6. *Edicta*. Originally the judicial authority resided with the king; it was afterwards shared by the consuls, and subsequently vested in the prætor. The law was that of the Twelve Tables; but it was impossible that principles so narrow and rigorous could long maintain their ground, for they availed none but Roman citizens. With conquest and civilization came enlightenment; and the rules of a barbarous and exclusive system proved inadequate to sa-

tisfy the requirements of justice, increased as they were by the multiplied relations between man and man. The dispute was no longer between citizen and citizen, but between citizens and strangers, who had come to reside, for purposes of commerce or recreation, within the Roman territory. The *prætor urbanus* might suffice for the people of Rome, but some magistrate was required who should administer justice to foreigners: hence the *prætor peregrinus*, who was created B. C. 243. This magistrate, instead of confining himself to the strict law, which was totally inapplicable to any but Roman citizens, adopted a broader and more liberal basis, and administered justice according to those universal principles of law which are founded upon reason and admitted by all mankind. In short, he followed the *jus gentium*.

The superior wisdom of its principles soon became obvious even to the Roman citizen; but still any direct interference with the hallowed decrees of the Twelve Tables was impossible. Nevertheless, it was possible to attain the same end by indirect means, and the plan was this:—The prætor on assuming office published an *edictum*, in which he defined the principles according to which he should administer justice. This edict were inscribed (*in tabulis, in albo*) by successive prætors; but the authority of each expired with its author. Experience, however, often proved the utility of some regulations suggested by a prætor; these were re-enacted by his successor, and not unfrequently became permanent. By this means the strict rules of the Twelve Tables were modified and its deficiencies supplied, till at last the prætor's edict became, as Cicero tells us, the text-book of the Roman student, even to the neglect of the Twelve Tables. It is impossible at present to explain the ingenious means by which the prætors managed to extend their jurisdiction, and to modify and enlarge the principles of the Twelve Tables. The study of the civil law itself can alone do this.

We know, however, that the edict was the subject of most elaborate treatises by the most eminent Roman lawyers; and, in Hadrian's time, Salvius Julianus was directed to draw up an edict which should be recognized by all future prætors, and form a *permanent* chapter of the law. This was called the *edictum perpetuum*—*perpetuum*, however, in a different sense from that ordinarily attached to the term—for it generally signified that the edict was to continue during the whole of the prætor's year of office.—We may add that the *edictum prætoris*, denotes that pub-

lished by the two prætors; *edictum provincia*, that published in the provinces; *edictum tralatitium*, the portion of the edict transferred from the old one to the new; *edictum novum*, the new portion.

Moreover, the prætors were not the only magistrates who published an edict, for the ædiles did the same with regard to the police of the markets. Lastly, we may mention that the edicts of the prætors and the ædiles were denoted by the term *jus honorarium*, because the law so created was promulgated or created by magistrates, *qui honores gerebant*; *honores* signifying offices entitling the possessors to certain external marks of dignity.

7. *Constitutions.* After the destruction of the republic by Augustus, the power of the emperor, though at first nominal—for he was styled *princeps reipublicæ*—gradually increased, till at length he became “the state.” Indeed this result followed almost as a necessary consequence, after the emperor had concentrated in himself all the chief offices. The supreme power, *imperium*, was vested in him by the *lex regia* (p. 5) passed at the beginning of each reign, by which the people delegated to him their absolute power. The emperor expressed his will in various ways; e. g., by *edicta*, *decreta*, *rescripta*, explained p. 6, and *mandata*, directions to officers.

Such is a short summary of the sources of the Roman law; and, looking to the variety of the sources, the lapse of time, the many revolutions, and the extraordinary development of the Roman state, we cannot be surprised that in Justinian’s time the law should be voluminous and perplexed, or at the necessity felt for arrangement and codification. It must not be supposed, however, that immediately before Justinian’s time direct reference was made by the judges to the text itself of the *leges*, the *edicta*, the *senatus-consulta*, and the *plebiscita*. For the Commentaries of the great jurists upon the text had in fact superseded the authority of text itself; hence we are justified in saying that from the time of Constantine, the law consisted substantially of these *Commentaries* and the *imperial Constitutions*.

Now, as early as the year A. D. 306, Gregorianus, and A. D. 365, Hermogenianus, had made collections of all the imperial Constitutions; these codes, however had no legislative authority. But in the year A. D. 438, Theodosius II. published a code for the eastern and western empire, which embraced all the Constitutions of the emperors after Constantine, besides which he published certain *Novellæ*.

In the year A. D. 528, Justinian appointed a commission

of ten jurists, with Tribonian at the head, to draw up a new code, taking those we have mentioned and the Novellæ as the basis. In the month of April 529, their task was completed, and a code was published, by the effect of which all Constitutions, not included therein, were abolished, and every Constitution it did include was made applicable to every subject of the empire.

Having arranged the Constitutions, Justinian commissioned Tribonian, with sixteen others, to make select extracts from the writings of the elder jurists, which they were authorised so to alter and arrange as to make them accord with the change of manners and the dictates of justice, the object being to exhibit in a systematic form a complete exposition of Roman law. One difficulty, however, at once became apparent. There were certain moot points upon which the schools of Sabinus and Proculus held contradictory opinions, to settle these, therefore, Justinian promulgated his Fifty Decisions (*Quinquaginta Decisiones*). Relieved from this perplexity, Tribonian and his colleagues applied themselves to their task, and in the incredibly short space of three years (Dec. A. D. 530—533) published the *Digesta*, or *Pandectæ* (general collection), into which, as the emperor said, *omne jus antiquum collatum est*. This Digest had the force of law (1).

But it occurred to the emperor, that, for a student, the Code and the Digest would be too voluminous; he therefore directed Tribonian, with Theophilus, and Dorotheus, Professors of Law, the one at Constantinople, the other at Berytus to draw up an elementary work, or *institutiones* of Roman law. This, which followed the well-known work of Gaius, was not simply a book of instruction, for it was declared to have the force of law.

(1) It is divided into fifty books and seven parts, corresponding to the edict, for it followed Ulpian's work on the same subject. Each book consists of titles, each title of extracts, and each extract of a *principium* (Pr.) and paragraphs. These extracts, which are headed by the name of the jurist or legal author, are called *laws* (L.) or fragments (Fr.). The digest itself is denoted by D. or ff., and is referred to in various ways: thus, the reference to paragraph 6 of the 5th law of the title *De Jure Dotium*, which is title 3 of the 23rd book, is this: L. 5, § 6, ff. *De Jure Dot.*, or Fr. 5, § 6, D. *De Jure Dot.* (23, 3), or Fr. 5, § 6, D. 23, 3, or D. 23, 3, 5, § 6. So the Institutes, which are divided into four books, each of which contains several titles, and each title a *principium* (Pr.) and paragraphs, are referred to thus: Lib. 1, 13, § 1.

But Justinian, still unsatisfied with his legal reforms, directed Tribonian and four other jurists to revise the code of 529, and to incorporate the fifty decisions. This revised code (*codex repetita praelectionis*) was published, and obtained the force of law on the 17th Nov. 534. This is the Code we now have, but it should be observed that the Code of 529 is the one referred to in the Institutes, so that there are certain Constitutions referred to in it which are not to be found in the Code of 534.

Nor was Justinian satisfied even yet, for between the years 535 and 564 (A. D.), he published no fewer than 165 *Novellae Constitutiones*, or new Constitutions, which were generally written in Greek.

Till the reign of Basil the Macedonian, A. D. 867, these compilations were considered law; but he reconstructed the whole system, and embodied the law in the form of *Basilica*. These, though modified by successive emperors, continued to be the basis of the law till the taking of Constantinople, in 1453.

On the subject of this Introduction, see Kent's Com. vol. 1, and Gibbon, viii. 30.

EXAMINATION
IN
THE INSTITUTES OF JUSTINIAN.

BOOK I.

TITLE I.—OF JUSTICE AND LAW.

Q. THE object of the just man is to render unto every one his own. Now, in order to attain this, what is requisite?

Pr. A. *Justice*, or the fixed and continual will to render unto every one his own: and *jurisprudence*, or a knowledge of law (1).

Q. Define law.

Pr. A. The science of the just and the unjust; the body of rules which enables one in everything, whether human or divine, to distinguish the lawful from the unlawful (2). I say "divine," because, in Pagan Rome, the rules as to public worship,—the *sacred* or *pontifical* law,—was a branch of jurisprudence, and greatly affected the rights of citizens.

(1) *Jus*, law; *justitia*, the will to keep law; *jurisprudentia*, knowledge of law.

(2) A special knowledge of law (*scientia*) implies a *general* knowledge of every subject (*res humanæ et divinæ*); for everything is *justum* or *injustum*. Ulpian says, law is *ars æqui et boni*: that a jurist is a sort of priest and true philosopher. The Romans, however, did not confound law and morals—perfect and imperfect duties. Ulpian, therefore, must be understood to say only that law rests on morality, and that its precepts are binding more because of the moral than the legal obligation involved. *Jus* (*jussum*, order).—1. Law, or body of rules; 2. The right arising out of them, as *jus itineris*, right of way; 3. Judgment seat, as *in jus vocare*.

Q. What are the three fundamental maxims of law?

§ 3. A. 1. To live morally (*honeste*). 2. To injure no one. 3. To render unto every man his own. The whole system of law rests on these three moral bases, and it would be imperfect if any one of them were wanting. For there are some laws prohibiting certain acts, apart from any injury they may occasion, simply because they violate public morality: thus, a man may not marry two wives, or within certain degrees, &c. These and such like are founded on the first maxim, *honeste vivere*.

Q. Does law include every duty comprehended in this maxim?

A. No; law rests upon, but is not co-extensive with morality. *Vivere honeste* involves many duties, as charity, temperance, &c., to which law attaches no obligation. Such mere moral duties are styled *imperfect*, to distinguish them from *perfect* duties, which raise a legal obligation, and are enforced by law. This distinction is thus expressed: *non omne quod licet honestum est*.

Q. How is law divided?

§ 4. A. Into two parts. For a man has duties to each of his fellow men, and to the state, of which he is a member. Hence, 1. *Public* law, regulating the constitution of the state, and its relations with its members (1). 2. *Private* law, regulating the interests of one individual in regard to those of another. The Institutes discuss only *private law*.

Q. How is *private law* divided, as regards the sources from which it is derived?

§ 4. A. Into *jus naturale*, *jus gentium*, *jus civile*.

TITLE II.—OF THE LAW OF NATURE, THE LAW OF NATIONS, AND CIVIL LAW.

Q. Define the law of nature.

Pr. A. This, or *the law of living creatures*, is the law taught by nature to all animals: for some laws are obeyed, not by human intelligence, but by natural instinct. In obedience to it the sexes unite, and the young are provided for. Though man and brute both obey it, man alone obeys with his reason, and under a sense of duty.

(1) *Jus sacrum* formed part.

Q. Define the law of nations.

§ 1. *A.* This, or *the law of the human race*, is the law established by natural reason amongst all men; and is so called because it is observed amongst all civilized nations. Its characteristic, however, consists, not in being recognized by, but in being applied to every person within a state, whether foreigner or citizen.

Q. How do commentators divide the *jus gentium*?

A. Into *primary* and *secondary*. The primary law of nations contains those primordial principles which are admitted by all men, and which, being derived from the very nature of man, were revealed to him from the very beginning, even prior to the existence of those larger communities of which he soon became a member. Thus, at no period of man's history could he have been ignorant of the right of self-defence, or of his duty to worship God and honour his parents. The secondary law of nations, on the contrary, contains those principles which were created by the wants of society, and were developed as their necessity and convenience became apparent. Amongst such we include the notion of property, and almost all contracts, such as sale, hiring, &c., though some, as *stipulatio*, belong to the civil law (§ 2).

Q. Was the secondary ever practically inconsistent with the primary law of nations?

§ 2. *A.* Yes. The necessities of society gave birth to institutions inconsistent with the genius and provisions of the primary law. Thus the Roman jurists held slavery, the fruit of international war, to be part of the secondary law, although they admitted its inconsistency with the law of nature, *i. e.* the primitive state of man; for by nature all men are free.

Q. What is the civil law?

§ 1. *A.* This, or *the law of citizens*, is that which a people sets up for itself (*sibi constituit*), and which applies to citizens alone. Amongst all civilized nations, *jus privatum* consists of two parts: under the one, rights are claimed both by citizens and strangers; under the other, by citizens only. This second part is the *jus civile*. Hence there is a civil law of the Athenians, of the Gauls, and of the Romans. When the term "civil law" occurs, it is to be understood as the Roman (§ 2).

Q. How was the Roman civil law divided?

§ 3. *A.* Into *written* and *unwritten*. The former was that promulgated or expressly declared to be law by the legis-

lature. The latter was that introduced by custom and the tacit consent of the legislator (1).

Q. Did not unwritten form a large branch of civil law?

A. Yes. On the one hand, the law of the Twelve Tables, so far from abolishing all prior customs, referred to them as its necessary complement; on the other hand, as civilization advanced, the Twelve Tables proved too narrow and technical: new customs were introduced, and doctrines and practices, originally invented by jurists, were sanctioned and admitted to possess an authority equal, if not superior, to written law. Such was the origin of the *jus non scriptum*: and the terms *jus receptum*, *moribus introductum*, *sententiæ receptæ*, so common in the books, prove the importance and influence of custom on the development of Roman law?

Q. What are the sources of written law?

§ 3. A. 1. *Leges*; 2. *Plebiscita*; 3. *Senatus-consulta*; 4. Imperial ordinances; 5. The edicts of magistrates; 6. *Responsa Prudentum* (2).

Q. Define a *Lex*.

§ 4. A. It was, properly, a resolution adopted by the whole Roman *populus* (Patricians and Plebeians) in the *comitia*, on the motion of a magistrate of senatorial rank, as a consul, a prætor, or a dictator.

Q. Define a *plebiscitum*.

§ 4. A. A resolution adopted by the *plebs*. alone, in the *comitia tributa*, on the motion of a plebeian magistrate, i. e. a tribune (3).

Q. Had these *Plebiscita* the force of law?

§ 4. A. The Patricians long insisted that the *Plebiscita* were not generally binding without their sanction, and it

(1) Section 10 puts the distinction between written and unwritten law on the ground that Roman law was derived from Athens, where the law was written, and from Sparta, where it was committed to memory: a double error; for, even though the law of the Twelve Tables had been derived from unwritten law, it was written law at Rome, because its authority rested on its publication; moreover, the mere act of writing is nothing: so that the laws of Sparta, promulgated by Lycurgus, were written law, even although they were only committed to memory.

(2) These refer to the several modes of legislation. Except 3 and 4, the others are all spoken of in the past tense (*constituebat*, § 4, &c.). Sc. are spoken of in the present: for though the senate was not actually abolished, its power was merely nominal.

(3) The text is *veluti*, but tribunes were the only pleb. mag.

was not until the *Lex Hortensia* (B. C. 286) that they bound all the citizens.

Q. Define a *senatus-consultum* (1).

§ 5. A. A resolution of the senate.

Q. Whence the right of the emperors to make ordinances having the force of laws?

§ 6. A. By the *Lex Regia*, which, whilst it invested each emperor with his powers, clothed him with all public authority. For long this law was expressly renewed on each accession, but, afterwards, the authority it conferred was held to be transmitted to the new emperor by the fact of election.

Q. How many kinds of imperial ordinances (*constitutiones*) were there?

§ 6. A. Three: 1. *Rescripta*, instructions or answers (*per epistolam*) given by the emperor to questions put to him; 2. *Decreta*, decisions of the emperor as supreme judge (*cognoscens decrevit*) in cases brought before him by summons or appeal; 3. *Edicta*, rules voluntarily made by the emperor to meet cases which might arise: *Rescripta*, observe, determined those which had arisen.

Q. Were all Constitutions general?

§ 6. A. No. According to the imperial will, they were sometimes *general*, i. e. binding upon every citizen; sometimes *personal*, i. e. applicable only to particular cases and persons. Edicts were always general, decreta and rescripta often personal; e. g. the emperor sometimes allowed an individual to be legitimized, or adopted, or he pardoned a convict. Personal Constitutions were called privileges (*privata Lex*).

Q. Define the edicts of magistrates.

A. They were a sort of statement published by the magistrates on assuming office, to define the principles on which they should act.

Q. Which of the magistrates had the right to publish them? (2)

(1) The Sc. under the Republic were more connected with the execution of the law than with its creation and reform. Justinian alludes to those passed after the senate had replaced the popular assemblies (*comitia*).

(2) The prætor had to declare the law (*jus dicere*). This he did either *generally* in his edict (*edicere, edictum*) or *particularly*, when in a private suit he settled the question upon the determination of which the decision of the judge, to whom the cause was remitted, was to turn. In connection with the terms *jus dicere* we may mention *addicere, addictio* (*ad* attributive), meaning to

§ 7. *A.* The *magistratus populi Romani*, so called to distinguish them from the magistrates within cities and the plebeian magistrates; this right, however, was chiefly exercised at Rome by the prætors and the curule ædiles, and in the provinces by the *præsides* or governors, who there filled the office of prætors.

Q. Did not these edicts, particularly those of the prætors, exert great influence on Roman law?

§ 7. *A.* Yes. For the prætors, as judicial officers, introduced by means of them new rules and *formulae* (1), which regulated and confirmed general customs, modified the rigorous technicality of the Twelve Tables, and thus kept the law on a level with the progress of civilization; so that the Twelve Tables, having their defects thus supplied, continued, down to the lower empire, the basis of the Roman law. The changes thus introduced by successive prætors, when sanctioned by public opinion, were transferred year by year from one edict to another, and finally became a part of the Roman law under the name of prætorian or *honorarium jus*, to distinguish it from the *jus civile* or *strictum jus*, the law of the Twelve Tables.

Q. Whence the name *jus honorarium*?

§ 7. *A.* Those magistrates who published edicts were entitled *gerere honores*, i. e. to certain external marks of dignity. This name, therefore, was given to law created by magistrates *qui honores gerunt*, whether prætors or curule ædiles.

Q. What were the *Responsa Prudentum*?

§ 8. *A.* The opinions and decisions of such jurists as the emperor allowed to lay down the law (*condere*). During the Republic, these opinions being merely private, formed part of unwritten law. Augustus first gave certain jurists authority to interpret the law. Adrian defined the extent of their authority by declaring, that if they were unanimous (*omnium*), their opinion should be law, but that, if not, the *judex* should himself determine.

Q. Was the civil law unalterable?

§ 11. *A.* No; it was altered according to the will of the

transfer the property, by declaring the law: whilst *adjudicare*, *adjudicatio*, mean the transfer of the property by the *judex*, who was sometimes authorized so to do by his judgment. So, we may observe, that *esse in jure* means to be before the prætor, *in judicio*, to be before the *judex*, who is charged to inquire into the evidence relative to the question submitted by the prætor, and to give judgment thereon.

(1) B. 4, tt. 6, 13, 15.

nation which established it. Herein it differed from the *jus naturale* (in which we include *jus gentium*), which, being based on the nature of man, was fixed and immutable (1).

Q. How was the civil law altered?

§ 11. A. The text says, by a new law (*alia postea lege data*), or by tacit consent of the *populus*, i. e. by disuse (2).

Q. What are the subjects of civil law?

§ 12. A. Persons, things, and actions. Persons; for a man's rights vary with the class to which he belongs, viz. whether he is free, a slave, a citizen, or a stranger, a *pater-f.*, or a *filius-f.*, &c. Things; for rights vary with the subject-matter to which they apply, viz. whether they be moveables or immoveables, corporeal or incorporeal, &c. Actions; for they are the legal modes of protecting and enforcing rights.

TITLE III.—OF PERSONS.

Q. What is meant by person, in law?

A. *Persona* is any being, regarded as capable of having rights and owing duties. Hence *persona* includes not only physical men, but also certain abstract or metaphysical beings—creatures of the law, deemed capable of rights and duties; e. g. the state, a city, a corporation, &c. Conversely, all men are not persons; for slaves, according to the old law, and in respect to their masters, had no rights and owed no duties. They were *res*—things in which *persons* had rights (3).

Q. Explain the derivation of *persona*, and its original meaning.

A. *Persona* is a mask used by actors on the stage. For

(1) This is not strictly true. For the *jus gentium* does change with the changes in civilization. Thus slavery, which was once part of the law of nations, is not so now.

(2) This doctrine obviously refers to the old political constitution of Rome, where the *populus* had legislative power, and could therefore repeal a law. But that power being transferred to the emperors, Constantine was entitled to say that custom could not prevail against law.

(3) Still slaves had a personality. Thus they might be *heredes instituti*, and, sometimes, might bind their masters. Moreover, a slave might be punished for committing a wrong, and, in late times, his master could neither put him to death nor ill use him (T. 8, § 2).

in Roman law rights and duties were not attached to the physical thing man, but to certain qualities which invested him; *e. g.*, that of being free, a citizen, a pater-f., &c. Now, it was the possession of these qualities which entitled a man to play a particular part in society, and constituted the *person* (1).

Q. What is the great distinction between one man and another? or how are persons divided?

Pr. A. Into freemen and slaves.

Q. What is freedom?

§ 1. A. The right to exercise our natural powers in any way not forbidden by law. Hence, law (*jure*), and physical weakness (*vi prohibitum*), are the only restraints on our natural freedom; any other restraint, though it may hinder the exercise, cannot destroy the right of freedom. Thus, a man locked up in a room, though he cannot exercise his freedom, still has the right.

Q. Upon what principle does the restraint of our liberty by law rest?

A. On the necessity felt by every member of a society to alienate a portion of his freedom, in order to avoid being himself oppressed by others exercising their uncontrolled freedom.

Q. What is slavery?

§ 2. A. It is an institution of the *jus gentium*, by which, in violation of nature, one man is subjected to the power of another; stripped of that natural liberty, which permits a man to do whatever is not forbidden, the slave may do only what he has permission to do.

Q. How do men come to be slaves?

§ 4. A. By being born such, or by becoming slaves.

Q. When is a man born a slave?

§ 4. A. When his mother is a slave; for the child of a slave-woman is the slave of the mother's master, without regard to the father; and is called *verna* (born in the master's house).

Q. How did a man become a slave?

§ 4. A. According to the *jus gentium*, by being taken captive, which was the chief cause of slavery; according to the civil law, in cases where the loss of freedom was the punishment inflicted on those by law deemed unworthy of it.

(1) Hence, the same *man* is no longer the same *person* when his *status* or condition is changed; when, *e. g.*, being free he becomes a slave, or, being a citizen, he becomes a stranger, &c. So the same man may be several *persons*, *e. g.*, he may have the person of a citizen, a father, a tutor, &c.

Q. How did the Romans account for the origin of slavery according to the law of nations?

§ 3. A. They held that a conqueror had the right of life and death over prisoners of war (*manu capti*), and that, by sparing their lives (*servati*), he did not abandon the right, but merely postponed its exercise; and, certainly, this account corresponds with the etymology of the words *servi* (*servati*) and *mancipia* (*manu capti*).

Q. Did every species of captivity render a man a slave?

A. No captives became slaves except those taken in a war, waged by one nation against another: those taken by robbers or pirates, though deprived of freedom in fact, were still free by right.

Q. According to the civil law, when did a man become a slave?

A. In the old law there were some causes of slavery, unknown in later times, and not found in the Institutes. Thus,

1. By the Twelve Tables, the *addictio* made the insolvent debtor a slave. When a debtor had judgment against him for a sum of money, he was *adjudicatus*; if within thirty days thereafter he did not pay, or provide security, he was summoned before the magistrate (*in jus*), and, after the process of *manus injectio* (a sort of taking the body in execution), he was delivered (*addictus*) to the creditor, and so became his slave. The effect of *addictio* was modified within 200 years after the promulgation of the decemviral law. The *addictus* was no longer a complete slave, but a labourer compelled to work for his creditor until the debt was discharged. (B. 3, t. 12) (1).

2. By the Twelve Tables a man guilty of *furtum manifestum* (B. 4, t. 1) became a slave. But after the prætors had provided the party robbed with another sort of indemnity, this ceased to be a cause of slavery.

3. Another cause of slavery, which continued longer, was when a man, in order to avoid public burdens, neglected to have his name inscribed on the census lists.

(1) It was probably the *lex Petilia Papiria* which modified the condition of the *addictus*, and assimilated him to the *nexus*. The *nexus* was one who transferred himself and his property to his creditor, in pledge. This personal engagement, contracted under the form of sale, was at first, probably, an actual sale, making the *nexus* a slave. But after the Twelve Tables its character was changed. For, though the debtor was so far subject to the creditor that he was bound to serve him till the debt was discharged, he retained his freedom, and his *status* was unaltered.

This cause, of course, ceased when the censor's power was abolished, under the earlier emperors.

In Justinian's time, the causes which might reduce a man to slavery were four :

1. The illegal commerce of a free woman with a slave. The Sc. Claudianum reduced any woman to slavery who had such commerce against the will of the slave's master : but this was repealed by Justinian (B. 3. t. 12, § 1).

2. Condemnation to certain punishments. A man condemned to death immediately lost his freedom. So that, until his execution, (sometimes long delayed, as when he was intended for the beasts of the circus,) he was deprived of all rights, both under the civil law and the law of nations. Again : condemnation to work in the mines, if for life at least, made the condemned man a slave of Punishment (*servus pœnæ*, t. 16, § 1) ; but Justinian, by Nov. 22, declared that the culprit should continue free notwithstanding the punishment.

3. The ingratitude of a freeman to his patron.

4. The fraud of one who got himself sold as a slave, in order to share his price.

The two last Justinian retained.

Q. Explain the last.

§ 4. A. Freedom was inalienable(1). Therefore, although a man could not sell himself, this principle might be made the means of committing fraud. Thus, two freemen agreed together that the one should sell the other as a slave to a *bond fide* purchaser, the price to be divided between the two accomplices. After the sale, the supposed slave claimed and recovered his freedom, for to such claim the sale was no bar : so that the purchaser lost both his money and his slave. This abuse was remedied probably by the Sc. Claudianum, which enacted that the fraudulent party, if above twenty, should continue a slave, provided that he had acted knowingly, i. e., knowing his free condition (*status*), and that he had actually received a share of the money.

Q. Was there any legal difference between one slave and another ?

(1) Probably this was not so under the old law. Niebuhr thinks that *nezum* was originally an actual sale, made by a man of himself. A father was always entitled to sell his children ; and, at first, such sale gave the purchaser rights differing little, if at all, from those of a master over his slave.

§ 5. *A.* No. The master had absolute rights over all (1), though the position of one might be better than that of another. Some slaves (*vicarii*) had a sort of authority over others (*ordinarii*); and a master-slave had often the direction of inferior slaves. But these were mere private arrangements—not legal differences—and might be put an end to at any moment.

Q. Was there any legal difference between one freeman and another?

§ 5. *A.* Yes: many (2). The legal division of them was into *ingenui* and *libertini*.

TITLE IV.—OF INGENUI OR FREEBORN PERSONS.

Q. Define an *ingenuus*.

Pr. A. One born free, who has never ceased to be free.

Q. Who is born free?

Pr. A. 1. One born of a lawful marriage, contracted between two freeborn, or two freed persons, or between a freeborn and a freed person, for then the child followed the father's condition at the time of its conception; and at that time the father must have been free, for unless persons are free there can be no civil marriage.

2. One born, not of a lawful marriage, but of a free mother, or of a slave mother, who was free at the time of conception, or during any time of her pregnancy.

(1) In the lower empire, this was true only of slaves proper.

(2) During the earlier empire, they were most numerous. Then there were several degrees between the Roman citizen (*civis romanus*) and the stranger (*peregrinus*),—a general name for the people of the various Roman provinces (*gentes*). There were two degrees of *peregrinitas*. There were ordinary *peregrini*, i. e., *peregrini socii*, and *peregrini dediticii*, a lower grade. Throughout Italy, no doubt, the social war had put an end to the distinction between the full *jus civitatis* and the *jus Latii*, or law of the rest of Italy, *jus italicum*; but it survived in the provinces, where some colonies or privileged cities enjoyed the *jus italicum*, i. e., such privilege as the Italians had before they acquired full rights. (As to Freedmen, see next Title). After Caracalla gave the title citizen to all freeborn subjects of the empire, and Justinian to all freedmen, there were no classes of *cives*, and the only *peregrini* were the barbarians, who were altogether beyond the pale of the Roman empire.

Q. In the second case, is any regard had to the father?

A. No. When the condition of the child was determined by that of the father, it was solely because there had been a lawfully-contracted marriage: under any other circumstances the condition of the child followed that of the mother, in accordance with the *jus gentium*. Therefore it mattered not whether the father was free or a slave: nay, even though the father was known, it would be the same as if he was unknown (and the child therefore *vulgo conceptus*), for it would follow the condition of its mother (1).

Q. Suppose a man free born, mistaken for a slave and freed by his supposed master, was he a *freedman* or *ingenuus*?

§ 1. A. *Ingenuus*: birth, not enfranchisement, made him free, nor did he cease to be free because in fact he was treated as a slave (*in servitute*). But a freeborn man, if he became a slave, did not by enfranchisement recover his *ingenuitas*.

TITLE V.—FREEDMEN (2).

Q. What is a freedman?

A. One legally freed from real slavery (3).

(1) The condition of the mother *at the child's birth* is the great point. Hence, if the mother is then (*quo nascitur*) free, though she may have been a slave (*ancilla*) at the time of conception, the child is free. On the other hand, if the mother had been free at the time of conception, or during the pregnancy, but is a slave at the time of the birth, the child ought properly to be a slave; but from humanity, and in favour of liberty, such child was considered free born. It has been said, this followed from that fiction of law by which a child when conceived is regarded as born, in any case where its interests are concerned, *infans conceptus pro nato habetur quoties de commodis ejus agitur*: but this is not so. Ortolan observes, that when the *status* of the father determines that of the child, the time of conception is the point, because there the child's connection with the father ends; but when the *status* of the mother is to determine the matter, the time of birth must be the point, because, till then, the child is part of the mother. *Pr.*

(2) A freedman was *libertinus*, as opposed to *ingenuus*, and *libertus*, in relation to his patron.

(3) The text says *manumissi*; but as *manumissio* was not always required in order to a slave being freed, our definition, or that at the end of the section (*qui desierunt*), viz. those who have ceased to be slaves, is more accurate.

Q. How was a man legally freed?

A. By enfranchisement (*manumissio*) (1), when a master, having lawful power, gave his slave freedom by means sanctioned by law:—not by enfranchisement, but by some means allowed by the Constitutions, and described in the Digest, *de his qui sine manum: ad lib. pervenerunt* (2).

Q. What are the legal modes of enfranchisement?

§ 1. A. In later times they were very many. The text enumerates—1. Those made in churches, before the people, with the aid of the bishops, who signed the act of enfranchisement. This mode, introduced by Constantine, took the place of that by the *census*, which was when the master had the slave's name inscribed, as a Roman citizen, on the census lists, prepared once in five years—a custom long discontinued. 2. By the *vindicta*, before the magistrate, with solemn words and gestures. 3. By a declaration made verbally, *inter amicos*, before friends. Justinian fixed five as the number of witnesses to sign the written document attesting this declaration. 4. By letter, *per epistolam*, to be signed by five also. 5. By testament, or other act of last will; *i. e.*, codicil. 6. By various modes described in the Constitutions of Justinian and his predecessors (C. 7. 6, 3—12): as when a master publicly called his slave "son," or, in presence of five witnesses, delivered to the slave, or destroyed the documents, proving his slave condition.

Q. Whence the term *vindicta*? Explain its forms.

A. It is now generally agreed that this mode, which dates back to the old *actiones legis*, consisted of a fictitious suit, in which freedom was the thing claimed. When a free man was unjustly enslaved, any citizen might become his champion, and sue his alleged master. This process was the *assertio in liberatem*; and it was used in the following way, as a mode of enfranchising a real slave. Any friend, or a lictor, became *assertor libertatis*, maintaining before the magistrate that the slave was free: the alleged master did not deny the assertion, and the magistrate al-

(1) *Manumissio*, a putting out of hand or out of our power.

(2) Thus, an edict of Claudius declares free and without patron any slave abandoned by his master as diseased or infirm. A rescript of Marcus Aurelius declares, that any slave sold on the condition that he should be enfranchised after a period, should be free after the lapse thereof, even though the purchaser had taken no steps towards it, provided the seller, if still living, has expressed no intention different from that expressed at the sale.

lowed the plaintiff's claim, and declared the slave free (*ait te liberum more quiritium*). All this was done with solemn word and gesture; a rod (*vindicta, festuca*) being also used, which the plaintiff held as the sign of dominion or property. Hence the name *vindicta*, for this mode of enfranchisement.

Q. What classes of freedmen were there?

§ 3. A. Prior to Justinian they were divided into *cives Romani*, *Latini Juniani*, and *dediticii*.

Q. How did these distinctions arise?

§ 3. A. At Rome, in early times, liberty was indivisible (*una et simplex*), and every freedman became a Roman citizen. But no man was held to be legally enfranchised unless these conditions concurred: 1. The master must have had over the slave in question, ownership according to the civil law (*dominus ex jure quiritium*) (1). 2. The master must have used one of the three modes of enfranchisement recognised by the civil law: *censu*, *vindicta*, *testamento* (2). If the enfranchisement wanted any one of these conditions, e. g., if the master, instead of owning the slave *ex jure quiritium*, held him *in bonis*, or if an informal mode, as *inter amicos* or *per epistolam* was used, the enfranchisement was void by the civil law, and the master might reclaim (*revindicare*) his slave. But the

(1) At Rome there were two kinds of property: 1st. *Quiritarian property*, which was acquired by a Roman, according to the conditions and forms of the civil law (*dominium ex jure Quiritium*). 2. *Prætorian property*, a mere right of possession, which was protected by the prætors, and possessed most of the benefits peculiar to the former. This was the property, according to the *jus gentium*, and was expressed by *in bonis habere* or *esse*. Some commentators called it *bonitarian*, as opposed to *quiritarian*. An enfranchisement by one who had a slave *in bonis*, was void according to the civil law: but though the slave was still a slave, he enjoyed, by aid of the prætor, liberty in fact, which was afterwards regulated by the *L. Junia Norbana*.

(2) These three were the *modi solemnes*: the *nonsolemnes* were originally part of prætorian law, conferring only that temporary freedom which was possessed by the *Latini Juniani*: it was not till Justinian's time that they were incorporated into the general law. The civil law doctrine of enfranchisement was based upon the principle, that as a new citizen was thus added to the state, the state ought to be represented in the ceremony of enfranchisement. Thus, when it was *censu*, the censor, when *vindicta*, the prætor, when *testamento* (which was made *calatis comitiis*) the populus respectively acted as representatives.

prætor, in obedience to the spirit of the times, protected the liberty of any slave whom his master intended to enfranchise. This liberty *de facto*, however, was far from complete. The slave was only relieved from service: in other respects he was still a slave: whatever he acquired was his master's, in whom it vested after the slave's death. Such was the law at the close of the Republic.

But at that period the right of enfranchisement was so grossly abused, and such a host of corrupt men had become citizens, that various laws were passed to remedy the evil, amongst them the *Ælia Sentia*. This law (passed A.D. 3, under Augustus) added several conditions (*vide* next Title) to those already required; thus, the slave was required to be thirty years old, unless the enfranchisement was *vindicta*, and unless the grounds thereof were approved by a special council (*vide* next Title). Again, no slave enfranchised after suffering an *infamous* punishment, as *stigmata*, could become a citizen; he could have the rights only of the *dediticii*. These were people who, having taken up arms against the Romans, had been vanquished, and surrendered at discretion. Amongst the subjects of the empire, their condition was the worst (§ 3).

As for those slaves whose liberty (*de facto*) was protected by the prætor, but who were not *de jure* freedmen, the *Lex Junia Norbana* (A.D. 17) secured them in the same rights (1) as were formerly possessed by the old colonists of Latium; hence their name *Latini Juniani*: Latini, for they had the *jus Latii*, *Latinitatis*; *Juniani*, for they were freed by the *lex Junia*.

Thus, there were three classes of freedmen: 1. Enfranchised citizens:—the three conditions concurring, (1). The slave thirty years of age; (2). His master *quiritarian* owner; (3). One of the formal modes of enfranchisement used. 2. *Dediticii*, who, during slavery, had suffered certain punishment. 3. *Latini Juniani*, whose characters were unblemished, but whose enfranchisement wanted one of the three conditions.

Q. Did Justinian retain these distinctions?

§ 3. A. No. The class of *dediticii* (practically unknown in Justinian's time), and the *Latini Juniani* he expressly abolished; he then decreed that all freedmen should have

(1) Or rather, the temporary enjoyment of such rights: for on the death of a *Latinus* his goods belonged to his former master, just as if he had been a slave (B. 3, t. 7, § 4). Moreover, *Latini Juniani*, might, under certain conditions, become full citizens, whilst *dediticii* never could.

the name and rights of Roman citizens, without regard to the age of the enfranchised, the nature of the enfranchiser's property, or the mode of enfranchisement adopted.

Q. After Justinian's time, therefore, might a master enfranchise as he pleased, without any legal form?

A. No. The effect of the new law was, that those modes of enfranchisement, *inter amicos, per epistolam, &c.*, which would formerly have given the freedman only the rights of a *Latinus*, now gave him the full rights of a citizen, just as if he had been enfranchised by one of the civil law methods. A party was at liberty to choose any one of the numerous modes of enfranchisement allowed in Justinian's time, but one he must choose.

Q. Did not Justinian afterwards abolish the distinction, to be found in the Institutes, between the *Ingenui* and the freedmen?

A. Yes. By a novella he put an end to all difference, political and civil, between them; and to the freedmen he granted the *right of gold rings* (1) and of *regeneratio*. But he left the rights of patronage.

Q. Wherein consist the rights of patronage?

A. 1. In dutiful respect (*obsequia*). The freedman having received *civil* life from his patron, owed the same respect to him as a son to his father. Thus, he could not summon the patron *in jus* without the leave of the magistrate, or sue him in an action involving *infamia*; and he was bound to supply his wants in case of need, &c. 2. In *jura in bonis, i. e.*, the patron and his family sometimes succeeded to the property of the deceased freedman (B. 3, t. 7). 3. In service (*operæ*) due by the freedman to his patron, according to the terms settled at the time of enfranchisement, under a contract of *stipulatio*, or by oath.

TITLE VI.—OF THOSE WHO COULD NOT ENFRANCHISE, AND THE GROUNDS OF DISABILITY.

Q. Had masters unlimited power of enfranchisement?

A. No. It was defined by the laws *ælia sentia* and *fusia caninia*.

Q. Explain the *ælia sentia*.

- A. 1. The slave enfranchised must be thirty years old.
2. Masters must not enfranchise in fraud of creditors; or,
3. Until the age of twenty.

(1) The right to wear rings, originally confined to senators, patricians, and *equites*, was afterward allowed to all *ingenui*.

Q. How did the *lex alia sentia* prevent enfranchisement in fraud of creditors?

Pr. A. As a general rule creditors might revoke alienations made by debtors in fraud of their rights; but it was a principle that liberty once granted was irrevocable (B. 3, t. 11, § 5). It was therefore necessary that the *lex alia* should annul the enfranchisement *ab initio*; hence it declared it null (*nihil agit*) as against those creditors who questioned it within ten years: for the debtor could not himself take advantage of his own fraud, in order to annul his own act of enfranchisement.

Q. When is an enfranchisement made in fraud of creditors, and null?

§ 3. *A.* *Fraus* means any damage; and in this sense the *lex alia sentia* ought to have annulled enfranchisements as fraudulent, provided the enfranchiser was insolvent already, or in consequence of the enfranchisement diminishing his assets. Such, indeed, was the opinion of Gaius; but Julian thought, that besides the actual loss (*eventus*) there ought to be an intention on the part of the debtor to injure the creditor (*concilium*); this opinion prevailed, so that in order to prove an enfranchisement fraudulent there must be damage in fact, as well as intention to damage.

Q. Was there any exception to the rule that an enfranchisement in fraud of creditors was null?

§ 1. *A.* One: when an insolvent debtor appointed his slave *hæres*, and bequeathed him liberty (*cum libertate*). For we must observe: 1. That on the death of a party insolvent and without *hæres*, the creditors were put into possession of the *hæreditas*, and sold it in the name of the deceased, for he had no legal representative. 2. That a slave, when appointed *hæres*, was compelled to accept the *hæreditas*; hence the name *hæres necessarius*. A master, therefore, whose *hæreditas* was so encumbered that he knew no one would accept it, appointed his slave *hæres necessarius*, in order that, if there should be a sale of goods, it should be in the slave's name, who was his successor and legal representative. This was the case in which the *lex alia* allowed the enfranchisement. But then there must be no *hæres* by testament, for, if there was one already, none other would be required; again, the master can enfranchise only one (*solus*) for this purpose; and when he enfranchised more, the first alone was free and *hæres*.

Q. In appointing a slave *hæres*, was it necessary to grant freedom expressly?

§ 2. *A.* Originally and strictly it was: but Justinian,

thinking that the fact of the appointment implied an intention to enfranchise (for a *hæres institutus* must be free), held it not necessary, as a general rule, to grant freedom expressly to a slave appointed *hæres* by his master.

Q. According to the *lex alia*, could a master under twenty ever enfranchise?

§ 4. A. Yes: but only by the *vindicta*, and after proof before the council (1) of a legal ground for enfranchisement. He might, however, enfranchise by testament a slave whom he intended to be his *hæres necessarius*.

Q. What is meant by *minor viginti annorum*?

A. A person was said to be *minor*, or *major* a particular age, when he was below or above it. Here, as the prohibition to enfranchise applies only to *minores 20 ann.*, it does not affect one in the last day of his 20th year; for, though not twenty years complete he is no longer under that age.

Q. What were legal grounds (*justa causa*) of enfranchisement?

§ 5. A. When, for instance, a person enfranchised his father (2), his mother, his instructor, his nurse, or his foster-brother. So, when a man enfranchised a female slave, that he might marry her, or a male slave, that he might act as his *procurator*. But in the case of the female, the patron must pledge his oath to marry in six months, and must marry, in fact, unless there be some legal impediment, *i. e.*, something arising after the enfranchisement; but a marriage, which the parties were not competent to contract, was not a good excuse: in the case of the male, he must be

(1) At Rome it consisted of five senators and five knights; in the provinces, of five *Recuperatores*, Roman citizens. It was in fact a jury, which, at the request of the *prætor* or the president of the province, determined whether the ground of enfranchisement alleged was true or false. This shows that the enfranchisement *vindicta* was in fact a fictitious suit. In the provinces, the last day of the judicial sitting (*conventus*) was the day for proving these grounds; and at Rome, on *certain* days, the *prætor* and the council discussed enfranchisements of this sort. As to those, by masters above twenty, of slaves above thirty, which required no investigation, the *vindicta* was mere form, and might be gone through at any time. The magistrate need not even be on the judgment seat, he might be merely passing along (*in transitu*), at the bath or the theatre (t. 5, § 2).

(2) A party might have his parent as his slave in many ways; but it usually occurred to a slave, whom his master had appointed his *hæres*.

seventeen, in order *postulare*, i. e., to state the plaintiff's or defendant's case to the magistrate. These are given by Justinian only as examples *justa causa*.

Q. The council having approved the ground, could it retract its decision?

§ 6. A. No: It was final, whether the cause alleged were really true or false.

Q. Did Justinian continue the restriction of the *Lex Ælia*?

§ 7. A. By it, one under twenty could enfranchise only by *vindicta*; therefore a master of full age (fourteen), who might by testament bequeath all his slaves, could not, until twenty, bequeath freedom to a single slave. This Justinian thought absurd: not observing, like the authors of the *Lex Ælia*, that the enfranchisement of a slave is much more important than the transfer of him to somebody else: to the state it is of little moment whether A. or B. is master: but it is of the greatest moment to take care that freedom and citizenship are not lightly bestowed. To remedy this supposed anomaly, Justinian decreed (as a kind of middle course) that a master of seventeen might enfranchise; and afterwards (Nov. 119, c. 2) he allowed any master to enfranchise when he could make a testament. As to enfranchisements *inter vivos*, the restriction of the *Lex Ælia* remained.

TITLE VII.—OF THE ABOLITION OF THE *LEX FUSIA CANINIA*.

Q. State the object of the *Lex Fusia Caninia*.

A. The same causes which occasioned the *Lex Ælia*, occasioned the *Lex Fusia*. Many Roman citizens, in order to have a crowd of freedmen at their funerals, and to leave behind them a name for benevolence, enfranchised their slaves by testament, and filled the town with unworthy citizens. The *Lex Fusia* put a stop to this, by fixing the number of slaves a man might enfranchise by testament, according to the number of his slaves, but in no case were they to exceed 100. If the testator did exceed, the proper number were enfranchised, according to priority on the list; and, if the names were written in a circle, none were enfranchised.

Q. Did Justinian retain these provisions?

A. No. He abolished this law, because he thought it unjust to give parties when living the right to enfranchise, and to deny it to them when dying; as if, indeed, it is not frequently necessary to deny that power to a testator,

which may be safely intrusted to one who cannot exercise it without depriving himself of something during his life.

TITLE VIII.—OF PERSONS INDEPENDENT (SUI JURIS), AND DEPENDENT (ALIENI JURIS).

Q. How were persons divided, as members of a *familia*?

Pr. A. Into those *sui juris*, dependent on themselves; and *alieni juris*, dependent on others. Every person must be either the head, or subject to the head of a *familia*. The head, if male, was *pater familias*; if female, *mater familias*.

Q. Did the title of *pater-f.* depend on the fact of paternity?

A. No. A child might be a *pater-f.* at its birth; for unless it belonged to a *familia*, it was itself a *familia*.

Q. Are all persons subject to a *pater-f.* under the same kind of subjection?

A. No. The *pater-f.* had over some the parental (*parentium*), over others the master's power (*dominorum potestas*) (1).

Q. Who are subject to the *potestas dominica*?

§ 1. A. Slaves.

Q. What was the effect of it?

A. The master was owner (*dominus*) of them. His *potestas* affected the *person* of the slave, who might be

(1) There were only two kinds of power (both denoted by *potestas*) in Justinian's time, but, in the old law, there were two other kinds, *manus*, and *mancipium*. These last, though originally applied to everything held by a Roman citizen, *viz.*, slaves, wife, children, &c., acquired, after the Twelve Tables, a technical meaning. *Manus* was the power which a husband, or an ancestor, to whom the husband was subject, had over the wife in certain cases; for every wife was not in the *manus* of her husband; she sometimes continued in the *potestas* of her father. This *manus* was acquired: 1. By *confarreatio*, accompanied by its own *pactum*, a religious ceremony, in which a meal-cake was used. 2. By *coemptio*, the solemn sale of a wife to her husband. 3. By *usucapio (usu)*, wherein the husband acquired a title to his wife by uninterrupted possession for one year, which, however, was broken by the wife sleeping for three nights away from the husband's roof. A wife, in *manus*, was regarded as the husband's daughter. *Mancipium* was the power of a *pater-f.* over a freeman, acquired by *mancipatio*, or solemn sale. Justinian finally abolished it.

disposed of, sold, abandoned, and even put to death by the master: it affected the *goods*, for everything possessed or acquired by the slave was the master's. Such was the early law. During the empire, however, it was modified; for, though a master might still sell, give away, or bequeath a slave, he no longer had the power of life and death. Antoninus Pius, by a Constitution, punished with death any master who, *without lawful cause, killed his own slave*, just as if he had killed another man's; and Justinian gives (§ 2) a rescript of the same emperor, by which masters are forbidden to inflict excessive punishment on their slaves, and magistrates are authorized to hear complaints of slaves, and to compel the master, if the complaint is proved, to sell the slave *bonis conditionibus*, i. e., on conditions advantageous both to the slave and the master.

Q. Give instances of such conditions.

A. A master was not obliged to sell on credit, or under the value. On the other hand, he could not impose on the purchaser terms unfavourable to the slave; e. g., that he should never enfranchise him, or should transport him to a severe climate.

Q. Did the emperor by this intend to dispute the master's right of property?

§ 2. A. No. That right he declared to be unshaken (*inlibatum*): he merely confined it within proper limits; for the right of property is not absolute, but subject to public interest. *Expedi enim reipublicæ, ne quis re sua male utatur.*

Q. Was the *potestas dominorum* as to the goods of slaves modified?

A. No. The old law was strictly adhered to. The slave was part of his master's chattels (*res*), and everything he had was his master's. But sometimes he was allowed to manage and enjoy part of the master's goods. This was a *peculium* (*separate, peculiar goods*), but it was a mere indulgence, which might cease at any moment.

TITLE IX.—OF THE PATRIA POTESTAS.

Q. Define the *patria potestas*.

A. The power possessed by a *pater-f.* over those children who belong to his *familia* (*fili-æ-familias*), or who have entered it by lawful marriage (*iustæ nuptiæ*), by *legitimatio*, or by *adoptio*.

Q. Was not this *patria potestas* peculiar to Rome?

§ 2. A. Yes. Generally, by the *jus gentium*, a father's power over his children is a protecting power—a guardianship—expiring when the child reaches maturity. But at Rome it was different. Hence the *p. potestas* was part of the civil law, and confined to Roman citizens; whereas the master's power over slaves was part of the *jus gentium*, and belonged to every owner, whether stranger or citizen. For by the old law a *pater-f.*, as proprietor both of his children and of his slaves, had the right of life and death over both. He could sell them (*mancipare*) (1), expose, or abandon them, in satisfaction of any damage they had occasioned; or he might punish them as household judge, even capitally. The Twelve Tables ordained that deformed infants should be put to death. Every acquisition of the *filius-f.* went to the *pater-f.*, who was sole proprietor of the family goods.

Q. Was this absolute *patria potestas* modified?

A. Scarcely at all during the Republic. But the change in manners so relaxed its rigours, that the *pater-f.* came at last to be regarded rather as the chief ruler than proprietor of the members of the *familia*. Under the emperors, the *patria potestas* was more and more restricted, both over the person and the goods of the *filius-f.* (2).

(1) A *pater-f.*, by the sale of his daughter, or any of his issue in the second degree, exhausted his *potestas*; but if it was the sale of a son, and he was enfranchised after the first sale by the first purchaser, he became immediately again subject to his father. The same happened on a second sale and second enfranchisement. But on a third sale, if the son was enfranchised by the third purchaser, he became *sui juris*. Hence the Twelve Tables: *Si pater filium, ter venum dedit, filius a patre liber esto*. This was for the son's benefit. Indeed, though the *p. potestas* may seem entirely for the *pater-f.*'s benefit, still the *filius-f.* derived important benefits, *e.g.*, rights of succession, from it. Moreover, children sold (*mancipati*) were not, at least after the Twelve Tables, absolute slaves: they were subject to a special power called *mancipium*. Though the *mancipatio* of children existed in Gaius' time, it was only part of the form used in the enfranchisement of children from the *patria potestas*, or in their adoption by third parties. It was not, however, until later that children were no longer surrendered, as a kind of satisfaction, for damage done by them. A constitution of Diocletian declared that fathers should not sell, give away, or pledge their children.

(2) Trajan made a father, who had ill-treated his son, enfranchise him. Adrian condemned a father to *deportatio* who had

As to the *person*, the *pater-f.* had not, latterly, the right of life and death, or of exposing his *filius-f.*: he could not sell him except at the moment of birth (*sanguinolentos*), and when compelled by extreme misery. If he desired to inflict extraordinary punishment, he had to apply to the magistrate. As to the *goods*, the *p. potestas* was restricted by those *peculia*, over which the *filius-f.* had various rights (B. 2, t. 9).

Q. Over whom did the *patria potestas*, as the result of a lawful marriage, extend?

§ 3. *A.* Over all the children of the *pater-f.*, and his wife, over all the grand-children and other issue born of a *filius-f.*, and in lawful wedlock. But a daughter's children were not of her own *familia*: they were *filii-f.* of their father or grandfather, in whose *potestas* the father was.

Q. Did the mother never have her children, sprung from a lawful marriage, under her *potestas*?

A. No. Hence Ulpian says, that a *familia*, of which a woman *sui juris* is head, begins and ends with her: *familia suæ et caput et finis*.

TITLE X.—OF MARRIAGE.

Q. Define *nuptiæ justæ* or *matrimonium justum*.

T. 9, § 1. *A.* Marriage, generally, is the joining together of a man and woman for the purpose of imparting an absolute unity to their course of life (*individuum vitæ consuetudinem continens*): lawful (*justum*) marriage is a marriage contracted according to the civil law.

Q. What is meant by *individuum vitæ consuetudinem*?

A. Such unity as results from husband and wife having the same home, and the same social position (1): for the man, by taking a woman to wife, made her his companion, and shared with her his condition and rank; and herein marriage differed from *concubinatus*, a species of lawful union, in which a man took a woman without intending to elevate her to his own rank (2).

slain his incestuous son. Alex. Severus gave the magistrate jurisdiction to determine what punishment should be inflicted by parents. A Constitution of Constantine punished as a parricide a father who had killed his child; and by a Constitution of the same emperor, the right to sell new-born children was confined to cases of extreme misery.

(1) At Rome there was *no community of goods*.

(2) Concubinage resembled the Northern custom, *marriage by the*

Q. How did *justæ nuptiæ* and concubinage differ?

A. *Justæ nuptiæ* alone had civil consequences; thus, the husband was called *vir*, the wife *uxor*; the children had the status which their father had at the time of their conception, and were of his *familia*. But concubinage was the lawful commerce of a man and woman, without marriage (*licita consuetudo causa non matrimonii*): though contracted between Roman citizens, it had no civil consequences. The woman was not *uxor*: the children followed the mother's status, and were not in their father's *potestas*, but *sui juris*. Moreover, they had a known father, and were therefore called *naturales*, to distinguish them from *legitimi*, i. e., the issue of *justæ nuptiæ*, and so members of their father's *familia*. Again, *natural* children differed from *spuriis* or *vulgo concepti*, who had no recognised father, being sprung from an unlawful and transitory union, *stuprum*.

Q. Was any ceremony required for *justæ nuptiæ*?

A. No; like concubinage, consent alone was necessary (1). Sometimes there was a writing, either as a record of the marriage (*nuptiales tabulæ*), or containing

left hand. Unlike marriage, because it wanted the essential *indiv. vite*, &c., it was still sanctioned and regulated by law, being quite distinct from the unlawful union (*stuprum*). The parties must both be free, and no one could have more than one concubine. It might be dissolved at the will of either party, without any formal divorce, or the act of renunciation (*repudium*) being sent. Concubinage was adopted as a means of increasing population. Constantine discouraged it, and declared that a father should leave nothing to his natural children; and that no persons of rank (*illustres, spectabiles, clarissimi*) should have concubines. But Justinian allowed it. Leo, the philosopher, first abolished it in the East. In the West, it continued longer, and we find it in the laws of the Lombards and the Franks.

(1) That is, the old *confarreatio*, or *mancipatio*, was not necessary; and a marriage, by consent of the parties, and approved by friends and neighbours, was good. But probably (Ortolan, t. 1, p. 195) consent alone did not complete the contract, for this seems to be one of those requiring *delivery*; the woman must be brought to her husband's house—till then the marriage was only intended; the phrase *uxorem ducere* shows this. The marriage, however, was complete without *cohabitation* (*non concubitus sed consensus facit*). Marriage by mere consent was probably introduced when forms began to lose their importance in Roman law. One reason for the disuse of *confarreatio*—the only mode by which a wife did not come into the *manus* of her husband

the agreement as to the *dos* (*instrumenta dotalia*) ; but this was mere matter of evidence, which might be obtained otherwise, and did not constitute marriage. Hence the question, whether it was a case of *lawful marriage* or *concubinage*, depended on this alone, whether the husband intended to take the woman as his wife or as his concubine : *concubinam ex sola animi destinatione æstimari potest.*

Q. Was not the intention sometimes presumed ?

A. Yes. When the woman was free-born and of good reputation, it was presumed that she was *uxor*, and nothing less than a written declaration to the contrary would rebut this. But if the woman was of bad reputation, or incapable of becoming an *uxor*, it was presumed that she was intended for a *concubine*.

Q. What conditions did the civil law require for *justæ nuptiæ* ?

Pr. A. 1. The parties must be (*puberes*) of full age. 2. The parties themselves, and certain others, must consent. 3. The parties must have *connubium*.

Q. What is the age of puberty ?

A. Justinian fixed it at fourteen for males, and twelve for females. Before puberty, a party could not of himself contract ; nor could he perform the marriage duties : hence the necessity for the first condition. Of impotent *puberes*, all but *castrati* might marry.

Q. What persons should give consent ?

Pr. A. 1. The intended husband and wife. 2. The ancestor in whose *power* the future husband and wife were. 3. Those in whose *power* the children of the proposed marriage might, some day, be. Thus, suppose son and grandson both in the *power* of the grandfather, the grandson, though not in the father's *power*, must get the consent both of the grandfather and of the father ; for, on the grandfather's death, the grandson and his issue must come under the *power* of the father ; and no one can become subject to another without his consent. But, in case of a daughter, the father's consent was not necessary, for her issue would be under *their* own, not *her* father's *power*.

Q. The father's consent, then, was not necessary for children *sui juris*, e. g. when emancipated, and the mother's consent was never required ?

—was, because it could not be dissolved except by a tedious ceremony, *diffarreatio*.

A. Not by the old law, for it looked only to the *patria pot.*, and did not consider a child's natural duty to its ancestor. But Valentinian and Valens, then Honorius and Theodosius, required women under twenty-five, though emancipated, to get their father's consent; and, if he was dead, their mother's and that of their next of kin.

Q. When was consent to be given?

Pr. A. It should precede (*precedere*) the marriage, for it was a condition precedent to it; now, as you cannot ratify a nonentity, there could be no ratification here.

Q. Must the consent be express?

A. It might be tacit, as when an ancestor knew of a marriage and did not object; but it must be a substantial consent—not given by mistake, or extorted by fraud or violence.

Q. Was not the presumption sometimes held sufficient, that consent would have been given by the ancestor had it been in his power?

Pr. A. Yes. Thus children of a captive, or of one absent above three years, might contract a suitable marriage without consent. In like manner, Hadrian allowed the daughter of a *lunatic* to marry; but the case of a son, by whose marriage children might be brought into the familia, differed. On grounds, however, of public convenience, and to facilitate marriage, Justinian laid down certain rules, on complying with which the son of a *lunatic* might marry without his father's consent.

Q. Explain *connubium*.

A. It is the capacity, which must exist in the future husband and wife, to be joined together in marriage. Any citizen of age, who has obtained the consent required, has the *general* capacity to contract marriage, but not with every individual; thus he cannot marry a stranger (*peregrina*), or one related within the forbidden degrees. But it is the *particular* capacity to marry *the individual* with whom we desire to form an union, which is denoted by *connubium* (1).

Q. Are there not several kinds of relationship?

A. Yes. *Cognatio* is the general term, but there are two kinds: 1. *Natural* relationship, which is *cognatio* proper; 2. *Civil* relationship, or *agnatio*. The first is the

(1) *Connubium* was only between citizens. The Emperor often granted it to a *peregrinus* or a *latinus*. After the title *civis* was extended to all the subjects of the empire, slaves were the only persons with whom there was no *connubium*.

tie of blood between a man and his descendants, or between those sprung from a common stock, *cognati*; the second is the legal tie between members of the same *familia*, whilst they are members (*agnati*, t. 15).

Q. What is meant by "line" and degree of relationship?

A. "Line" means a series of relations: *direct*, when they are descended from each other, as father and son; *collateral*, when they are not descended from each other, but have a common ancestor, as brother and sister. Relations are like persons coming down a flight of steps, each of which is a degree, occupied by a generation. In the *direct* line there are as many degrees as generations. Thus, from grandfather to grandson there are two. In the *collateral* line each relation is descended from the common ancestor by a particular line, which has degrees. The sum of the two lines shows the distance between the collaterals; thus the uncle in the first, and the nephew in the second degree from the common ancestor are to each other in the third.

Q. Between two relations in the direct line, what are the impediments to *connubium* and lawful marriage?

§ 1. A. No two persons related in the direct line, either by blood or by adoption, can intermarry, for they occupy the place of parent and child: the effect of adoption in this case is to create such civil relationship as to prevent the parties marrying, even after it is dissolved. Hence you cannot marry your adopted daughter or grand-daughter even after her emancipation.

Q. Could a father, having his daughter in his *potestas*, adopt his son-in-law?

§ 2. A. No; for so the wife would become the husband's sister. A father who wishes (*velit*) to do so, must first emancipate his daughter; for then the husband can enter the *familia*.

Q. Between two collateral relations, are there any impediments to *connubium* and lawful marriage?

§ 2. A. Yes; but they are less numerous than in the direct line; but when the impediment to intermarriage between collaterals is a mere civil relationship, it ceases the moment such relationship is dissolved. Thus, a brother may not marry a sister, but (*sed si*) if either be merely adopted, they may intermarry on being emancipated.

Q. Between two collaterals what are the impediments?

§§ 3, 4. A. Two collaterals cannot intermarry if either

is in the first degree from the common ancestor, for the person next to such ancestor represents him to all his descendants, and may not marry any of them, *quia loco parentis habetur*. Thus, you may not marry your brother or sister, or any of their issue (1). But (§ 4) cousins may, because both are two degrees from the common ancestor.

Q. Is it the same when the relationship is *civil*?

§ 3. A. Civil relationship, whilst it continues, has the same effect as natural relationship; but observe who are civil relations. I may marry the daughter of my adopted sister, for the *family-tie* between me and my sister does not extend to her children, for they are in their father's *family*, not in their mother's. So I may marry the woman adopted by my mother's father (*matertera adoptiva*), because I, being of my father's *family*, am unconnected, civilly or naturally, with that woman. But I may not marry my father's sister (*amita*) even by adoption, she and I being of the same family (§ 5).

Q. What is affinity?

A. *Affinitas* is the tie between one of a married couple and the relations of the other, or between the relations of one and those of the other.

Q. Does affinity give rise to any impediments to *connubium* and to lawful marriage?

A. Yes; but observe, it is only after the dissolution of *affinitas*,—a dissolution coincident with that of marriage,—that it begins to operate as a bar to a second marriage; for during the first, the *affinitas*, which is the result of marriage, cannot increase the impossibility of either party marrying again. The impediment to marriage, therefore, was not so much an existing *affinitas*, as the fact of its having existed.

Q. What were these impediments?

§§ 6, 7, 8. A. *Affinitas* prevents marriage between a husband and any of the ancestors or issue of his wife; and between a wife and any of the ancestors or issue of her husband; *quia loco parentum liberorumque habentur*. Thus, a man may not marry his stepdaughter (*privigna*), or daughter-in-law (*nurum*), or mother-in-law (*socrum*), or step-mother (*novercam*). But (§ 8) I might marry the daugh-

(1) Claudius, in order to marry his niece Agrippina, daughter of Germanicus, authorised by Sc. an uncle to marry his brother's daughter; but this exception, never extended to the daughter of a sister, was abolished by Constantine (t. 11, § 11).

ter of my stepmother by a former marriage, though her child, by my father, would be the half-brother or sister of myself and my wife (1).

Q. Did *affinitas* prevent husband or wife marrying the collateral of the other?

A. Not by the old law; but the christian emperors forbade a brother-in-law to marry his sister-in-law.

Q. Were there any cases in which public decency forbade marriage between those who never were in affinity to each other?

§ 9. A. Yes. If your wife, after being divorced, had a daughter by another man, you could not marry the daughter, though you had no *affinitas* with her. Neither could a father marry his son's betrothed, nor a mother the daughter's (2), nor a son the father's.

Q. Did the union of slaves (*contubernium*) create such a mutual relationship and affinity as to be an impediment to *connubium* between freedmen related by blood?

§ 10. A. Between slaves there was strictly neither relationship nor affinity; but the tie of blood created the same impediments to marriage between freedmen as between persons freeborn.

Q. Were there any other impediments to *connubium*?

§ 11. A. Yes; on civil and political grounds. Thus, a woman under twenty-six might not marry her tutor or curator, or their son or grandson, lest the tutor or curator might thus escape rendering proper accounts. A governor might not marry a woman domiciled in his province, for fear of his abusing his authority; nor might an *ingenuus* marry a prostitute or actress, nor a senator or his children, freedwomen. These restrictions (the violation of which, unlike those arising out of relationship or affinity,

(1) This is not because I am unconnected with my stepmother's family, but because *affinitas* was not always an objection to marriage. The relations of the husband and wife were allowed to intermarry; the connection between them had merely social and friendly results.

(2) *Sponsalia*, or promises of marriage, were used by the Romans. No action was raised by them to compel a marriage, and either party might renounce by giving notice: *conditioe tuæ nonutor*; earnest-money was usually given to the woman betrothed, and it was forfeited by the party making default, unless the case came within certain exceptions made in favour of the woman.

did not constitute incest) merely prevented lawful marriage—not concubinage (§ 1).

Q. Suppose a marriage, in which one of the three conditions is wanting?

§ 12. *A.* It was void. The husband was not *vir* nor the wife *uxor*. The children were not under the *potestas*, and were regarded as *spurii*. There was neither *dos* nor *donatio propter nuptias* (B. 2, t. 7). Lastly, the guilty parties were severely punished if the marriage was tainted with bigamy or incest.

Q. How were *justæ nuptiæ* dissolved?

A. By the death of husband or wife; by loss of liberty, or right of citizenship; by captivity, or by divorce (t).

Q. Might children, though not born subject to their father's *potestas*, become so after birth?

§ 13. *A.* Yes, *legitimatio*; but only *natural* children (i. e. those by a concubine), could be legitimised: *spurii* (the fruits of incest, adultery, or fornication) never could.

Q. Define *legitimatio*.

A. That act by which a child, not being the issue of a lawful marriage, acquired the name and status of a legitimate child.

Q. How was it effected?

§ 13. *A.* 1. *By subsequent marriage of father and mother*—a mode introduced by Constantine. Three conditions were required for this: 1st. That at the time of the child's conception, the marriage of father and mother would have been legal (*min. inter.*); 2nd. An instrument settling the terms as to the *dos* (*dotalia*), or to prove the

(1) Persons, if married by *confarreatio*, were divorced by *diffarreatio*; if by *æs et libram*, the husband alone (*buyer*) could renounce his wife by re-selling her; the wife who had been sold to the husband, could leave him only by his consent, but not without re-sale. Soon, however, the husband's right to renounce was restricted. He might be separated if she had been guilty of adultery, or had poisoned her children, or made false keys. If he abandoned her without cause, one-half his goods went to her, the other to the temple of Ceres, and he was devoted to the gods below. In marriage by consent, the divorce was by consent, or by repudiation on the part either of husband or wife. The divorce must be before seven witnesses. Theodosius and Valentinian fixed the grounds of repudiation. The one who dissolved the marriage without cause, incurred certain money penalties, as did the party who, by misconduct, gave the other good ground for repudiation.

marriage (*nuptialia*); 3rd. The children's ratification of the *legitimatio*; for they could not without consent become subject to the *patria potestas*.

2. By the *oblatio curiæ*,—*curia* being the senate of the municipal towns. To be *curialis*, *decurio* (member of this senate) had ceased to be an object of ambition, because of the responsibility thus incurred to make up the proper amount of taxes out of the member's private purse. To overcome the reluctance which was felt to being inscribed amongst the decurions, Theodosius attached certain privileges to it; for, 1st, natural children so inscribed were legitimised; and, 2nd, any wife of a *decurio* was legitimised. By this *legitimatio* a child became subject to the *potestas*, and acquired the right to succeed to his father, but not to other members of the *family*.

3. By *rescript of the emperor*,—a mode introduced by Justinian. But it was not granted unless there were no *legitimate* children, and unless marriage had become impossible, by the mother's death or other cause. The *rescript* might be obtained by the father, or, indeed, by the children, if his testament declared his wish that they should be legitimised.

TITLE XI.—OF ADOPTION.

Q. Define adoption.

A. That act by which a citizen acquired the *Patria Potestas*, through the mere effect of the civil law, apart from any tie of blood. Persons thus made subject to *potestas* were called adopted (*adoptivi*) (1), to distinguish them from *legitimi*, and from legitimised children, who were then called *natural*, because physically sprung from the *paterfamilias*; adopted children being generally sprung from a stranger.

Q. How many kinds of adoption were there?

§ 1. A. Two: 1. *Adoptio* (proper), by which filii-f. were transferred from the *potestas* of one to that of another.

2. *Adrogatio*, by which persons *sui juris*, i. e. patres-f., became subject to the *potestas* of another.

Q. Describe the process of *Adoptio*.

A. Prior to Justinian it was by *Mancipatio* and *cessio in jure*. *Mancipatio*, or solemn sale, when thrice repeated in

(1) The adopted took the name of the adopter's family (nomen); that of his former family being retained in an adjective form, e.g. *Scipio Æmilianus*.

case of a male child of the first degree, had the effect of withdrawing the child from the *patria potestas*; but it did not make him *filius-f.* of the purchaser: it put him only *in mancipio*. It was the *cessio in jure* that made him *filius-f.* This was a kind of fictitious suit or feigned recovery. The purchaser (the adopter) was supposed to claim the child: the pater-f. made no defence, and the magistrate declared the child the adopter's (§ 1). After the time of Justinian, who abolished these forms, adoption was (*imperio magistratus*) by a declaration of the natural father before the proper magistrate, in presence of, and uncontradicted by, the adopter and the adopted (t. 12, § 8).

Q. Did Justinian alter in any way the effects of adoption?

A. Yes: the chief effect of adoption was to take a *filius-f.* from under the *potestas* of his natural father, and to place him under that of an adopted father. Thus the *filius-f.* lost his rights in the *successio* of his natural father, without the certainty of retaining his newly acquired rights in the *successio* of his adopted father; for they might be taken away by his adopted father emancipating or disinheriting him. To prevent this (§ 2), Justinian declared that, if the adopter was an *extraneus* (i. e. not an ancestor), the adopted should still remain in the family, and under the *power* of his natural father, so that he would still be entitled to succeed him; but that, at the same time, he should by adoption acquire the right to succeed his adopter, if he died intestate, though if he died testate, the adopted should not be allowed to question the testament. As a general rule, adoption did not produce its full effect, unless an ancestor was adopter (1).

Q. Describe the process of *Adrogatio*.

§ 1. A. Formerly it was effected by a law (*populi auctoritate*). It was so called, because the *adrogator* was asked (*rogatus*) whether he was willing that the person about to be adopted should become his son; the *adrogatus*, whether he was willing to become such; the assembly (*populus*), whether they agreed. Afterwards the *imperial* was substituted for the *popular* sanction; and *adrogatio*

(1) E. g., a maternal grandfather, or a paternal grandfather, who has emancipated his son (*si pater fuerit emancipatus*); this is a necessary condition, for, if the son were not emancipated, the grandson would be in the power of the paternal grandfather, and the adoption would be useless.

was by imperial rescript (*imperatoris auctoritate, principali rescripto*).

Q. Explain the effect of adrogatio.

§ 11. A. By it the *adrogatus* himself, and all natural and adopted children, then under his power, became subject to the *adrogator*: by whom, also, the *adrogatus'* goods were acquired (lib. 2, t. 9).

Q. Was every one who was capable of being adopted, capable of being adrogated?

A. By the old law, women and *impuberes*, who were always capable of being adopted, could not be adrogated. But Justinian allowed it in case of women; and Antoninus Pius allowed it in case of *impuberes*, under certain regulations.

Q. What were they?

§ 3. A. After the usual inquiry as to the adopter's age, and the possible injury to the adopter's children (*causa cognita*), and after ascertaining that the motives of the adopter were right (*honestas*), and that the *pupillus* would be benefited (*expediat*), *adrogatio* might proceed, subject, however, to these conditions: the *adrogator* was bound, 1. To restore the goods received from the *adrogatus*, either to the *adrogatus* himself, if he was emancipated for a good cause, or disinherited; or, if the *adrogatus* died a *pupillus* (under age), to those who would have been entitled to the goods had there been no *adrogatio*. 2. To secure such restitution, by giving a security (*cautio*), the obligee of which should be *persona publica* (1). 3. To leave a fourth of his own goods to the *adrogatus*, if he was emancipated without good cause, or disinherited. This is the *Antoninian fourth*—when an *adrogatus* was disinherited there was no inquiry as to the cause, for if an *adrogator* had any good cause, his duty was to emancipate at once, and not to reserve the punishment for an act of his last will.

Q. Was any difference of age required between adopter and adopted?

§ 4. A. Yes: the adopter should be *plena pubertate*, that is, eighteen years older than his adopted son, and thirty-six years older than his adopted grandson. The rules as

(1) The *servus publicus* is often referred to in the Digest, because formerly a public slave used to stipulate on behalf of the *heredes* of the *impubes*. After Arcadius and Honorius' time, freemen performed the duty.

to adoption so far followed those of nature, that a man could not be an adopted son of an adopted father, unless they could naturally occupy that relation.

Q. Might one be adopted either as son or as grandson?

§ 5, 6. A. Yes: for a man might adopt another as grandson even though he had no son in *potestate*, nor need the adopted child occupy the same degree in the adopter's family, as he did in his natural father's; but, children of the *adrogatus* necessarily assumed in the adrogator's family a degree lower than that which they held in their father's: if he became son, they became grandsons, &c.

Q. Might not the adopter nominate one of his children as the father of the adopted?

§ 7. A. Yes: with that child's consent, for such child, as *pater-f.*, would have the adopted in *potestate*, when the adopter died; and no one could be under the *potestas* of another unless that other consented. In the absence of consent, the person adopted as grandson was deemed nephew of all the adopter's sons.

Q. Could an adopter emancipate his adopted son, or give him in adoption?

§ 8. A. Yes; but an adopter could not reassume, by a second adoption, the *potestas* he had cast off; whereas a natural father might re-adopt the child he had emancipated or given in adoption.

Q. Did impotence prevent a man adopting?

§ 9. A. No; but *castrati* could no more adopt than contract lawful marriage.

Q. Could women adopt?

§ 10. A. By the old law they were absolutely incapable of adopting, because they had no *potestas*, even over natural children; but the emperor sometimes permitted them to replace by adoption the children they had lost. In such cases, however, the adopted remained in his natural family, though he had the same rights of succession as the adopter's children by lawful marriage.

Q. Could a freedman or a slave be adopted?

§ 12. A. A freedman could be adopted only by his patron, if the patron had no posterity. A slave being neither *pater-f.* nor *filius-f.* could not be adopted; the effect of adopting was to enfranchise him. Moreover, Justinian held that a master, by publicly calling a slave his "son," enfranchised him.

TITLE XII.—HOW THE PATRIA POTESTAS IS DISSOLVED.

Q. How was the Patria Potestas dissolved?

Pr. A. Involuntarily: by the death of the pater-f. or filius-f., by the loss of liberty or citizenship on the part of the pater-f. or filius-f., and by the elevation of the filius-f. to certain dignities; voluntarily: by consent of pater-f. and filius-f., by emancipation, and by adoption.

Q. What effect had death on the Patria Potestas?

Pr. A. The filius-f.'s death put an end to it as regarded himself; but the pater-f.'s death relieved from the potestas all the filii-f. Each of them became *sui juris* (his own master) and head of a separate *familia*. But observe, on the death of the pater-f., the filii-f. of the first degree always became *sui juris*, not those of a lower degree; on the grandfather's death, his grandchildren became subject to their father, if he had been subject to the deceased. The grandfather's death, therefore, did not make the grandchildren *sui juris*, unless their father was then dead, or had by some means ceased to be of the *family*.

Q. Did loss of liberty or of citizenship have the same effects on the patria potestas, as death?

A. Yes: the patria potestas was a civil right, and the mere fact, that a pater-f. or filius-f. had lost the character of citizen, made him dead to all civil rights. *A fortiori*, this was so on the loss of liberty, which involved the loss of all rights.

Q. How did a man cease to be a Roman citizen and become a stranger?

A. 1. When he settled in a foreign country with no intention to return. 2. When fire and water were forbidden him, in order to compel him to expatriate himself; for it was a principle, that citizenship could not be forced from a Roman; hence no violence was used, but, being deprived of the necessities of life, he was obliged to leave. The prohibition of fire and water was replaced by *deportatio* to an island.

Q. Could a *deportatus* recover his rights of citizenship?

§ 1. A. Yes: when the emperor recalled him; but this restored him to civil rights for the future only, and did not reinstate him in those which he had lost by *deportatio*, unless, indeed, absolute restitution was granted (*per omnia*): for then he was reinstated in his original position, and in the *patria potestas* he had lost.

Q. How do *deportatio* and *relegatio* differ?

§ 2. *A. Relegatio* (rarely a perpetual banishment) left the condemned the name of citizen, and all his rights as one of a *family*. Ovid, who was *relegatus*, said—

“Nec mihi jus civis, nec mihi nomen abest.”

Q. Captivity being one mode of losing liberty (t. 3, *ante*), were any means invented for doing away with its effect?

§ 5. *A. Yes*. There was a legal fiction, *viz.* the *jus postliminii* (1), or right of return, by which a captive, if he escaped or was retaken from the enemy, was regarded as never having been in their power, and therefore, as having always had his civil rights. During the father's captivity, the *status* of the children was in suspense; if he returned, they had never been out of his power; if he died, they became *sui juris* at the first moment of his captivity.

Q. What dignities put an end to the *patria potestas*?

A. Originally, none but that of flamen or vestal. Justinian attached the same effect, first to the patriciatu (2), and then by Nov. to the dignity of bishop, consul, and, in short, to any which relieved a man from the duties of the curia. Moreover, by special privilege, filii-f. who became *sui juris* by dignities, retained their *family rights*, as was the general rule when filii-f. were emancipated before the pater-f.'s death (3). These dignitaries continued *agnati*, and, when the pater-f. died, succeeded him, and their children became *their* filii-f., just as if they had then for the first time become *sui juris*.

Q. Define *emancipatio*.

§ 6. *A. A solemn act* by which a *pater-f.* divests himself of his power over his filius-f., so that the filius-f. may become *sui juris*.

Q. What are the forms of *emancipatio*?

§ 6. *A. Three*. 1. The *old* emancipation, which was by several *mancipationes* (4) followed by several enfranchise-

(1) § 5. *Limine post*, because the frontier of the empire was a kind of threshold to which the captive came back.

(2) This was conferred by Constantine on eminent men chosen by him as privy councillors.

(3) When the *patria potestas* was dissolved by the pater-f.'s death, or by his losing his citizenship or liberty, the filii who became *sui juris* were still of the familia, which then consisted of several smaller *familiae*, the tie of *agnatio* being still undissolved (t. 15, *post*).

(4) *Vide* t. 9. Hence *emancipatio*.

ments. The *mancipatio*, or solemn sale, destroyed the *patria potestas* and put the filius-f. in *mancipio*, which was a kind of slavery. The enfranchisement by the purchaser made the filius-f. *sui juris*. As the enfranchiser acquired all rights of patronage (§ 6), the father, on occasion of the last *mancipatio*, added the trust-clause (*fiducia contracta*), i. e., an express condition that the purchaser should *remancipate* the filius-f. to the pater-f., so that, having ceased to be a pater-f., and being only an ordinary purchaser (1), he might himself enfranchise his child, and so acquire the rights of patronage.

§ 6. 2. The *Anastasian* emancipation, introduced by Anastasius. It consisted in obtaining an imperial rescript, authorizing the emancipation, which was to be registered with the proper officer. In this way a filius-f. might be emancipated in his absence, which could not be done by the old form *per as et libram*, since the purchaser had to lay hold of the thing.

3. The *Justinian* emancipation, a mere declaration of the pater-f. before the magistrate, no leave being required for the purpose (*recta via*).

Q. Did the last have the same effect as the other two?

§ 6, (*et tunc*). A. Yes. The pater-f. had the rights of a patron, just as in case of a *mancipatio*, *contracta fiducia*.

Q. Could the emancipatus ever lose the benefits of *emancipatio*?

A. Yes; by ingratitude, as a freedman did those of enfranchisement.

Q. When might adoption be said to extinguish *patria potestas*?

A. Whenever it transferred the adopted from the potestas of his pater-f. to that of the adopter: in case of *adrogatio*, this happened to the children of the *adrogatus*, and, in *adoptio* (proper), when the adopter was an ancestor of the adopted.

Q. To whose familia did a child belong, if he was the

(1) For the filius-f. was not then under *patria potestas*; that expired by the first or third *mancipatio*; he was in *mancipio*. The object of all the forms was to substitute for *patria pot.*, *mancipium*, a species of *potestas* dissoluble by enfranchisement. *Mancipatio* had by this time become a fiction, and was only retained as a form in emancipation and adoption. Justinian put an end to it, even as a form (*vide* 3rd form).

legitimate son of a *filius-f.* who had been emancipated or given for adoption?

§ 9. *A.* To that of him who was his *pater-f.* at the time of conception. Therefore a *filius-f.* conceived before, but born after emancipation, was of his grandfather's familia; if conceived after emancipation, of his father's familia.

Q. Could a *pater-f.*, when he emancipated his son or gave him for adoption, retain his grandson in his *potestas*, and *vice versa*?

§ § 7, 8. *A.* Yes: nor did the grandfather need his son's consent in order to emancipate his grandson, or to give him for adoption; but there could be neither emancipation nor adoption without the consent, express or tacit, of the person to be emancipated or adopted.

Q. Could *fili-f.* compel the *pater-f.* to surrender his *potestas*?

§ 9. *A.* Not in general; but there were exceptions. 1. One *adrogatus* under age might claim emancipation, if on reaching puberty he showed that the *adrogatio* was not for his benefit. 2. So might children who had been ill-treated by their father; and, 3. So might a daughter who had been prostituted by her father against her will.

TITLE XIII.—OF TUTELA (GUARDIANSHIP).

Q. How were persons *sui juris* divided?

Pr. A. Into, 1. Those in *tutela*; 2. Those in *curatela*;
3. Those neither in *tutela* or in *curatela*.

Q. Define *tutela*.

§ 1. *A.* It is the power (*vis ac potestas*) over a *liberum caput* (free person), granted or permitted by the civil law for the protection of one who, because of his years, cannot protect himself.

Q. Explain *liberum caput*.

A. A person not subject to *potestas* either *dominica* or *patria*. None but those *impuberes* and *sui juris* were subject to *tutela*, and they were called *pupilli*.

Q. Why granted or permitted?

A. To mark the distinction between *tutela legitima* conferred by the law, and *tutela testamentaria*, conferred by testament and permitted by law. Besides these two kinds, created by the Twelve Tables, there was a third, conferred by certain magistrates, called *atilianæ*, or *dativa*.

Q. Why granted or permitted by the civil law?

A. Because the civil law had its own rules as to guardianship, though in truth it was a doctrine of the *jus gentium*: for natural reason shows the obvious convenience of placing one, who cannot protect himself, under the guardianship of another (1).

Q. Why for the protection, &c.?

A. To show that guardianship, unlike *patria potestas*, existed only for the benefit of the person subject to it. The *pat. potestas* gave the father whatever the son acquired, stripped the son of all rights, and made him, in some respects, part of his father's property: this power, therefore, was chiefly for the father's benefit; but guardianship, though it conferred on the tutor a power to direct and administer, gave him no rights of property, either over the person or goods of the pupillus (*tutores quasi tutores*. § 2).

Q. Who might nominate tutors by testament?

§ 3. *A.* None but *patres-f.*, and they could do so only over such impuberes under their *potestas*, as on their death would become *sui juris*; for persons *sui juris* alone had tutors. Unless, therefore, my son is emancipated, I cannot nominate tutors for my grandchildren by him, though they are under my *potestas*, for at my death they must be under their father's.

Q. Could a pater-f. nominate by testament a tutor for postumi, i. e. filii-f. born after his death?

§ 4. *A.* Yes. For though *postumi* were held to be uncertain persons, and therefore could not be the objects of a testamentary gift (*vide tit. Legacies*), children were often (*compluribus*) regarded as born, although only conceived. The *pater-f.* could therefore nominate a tutor by testament for a *postumus*, whenever he could do so for a born child, *i. e.* where, had the *postumus* been born during the testator's life, he would have been under the immediate *potestas* of the testator; and this is what the text requires, when it says, that these *postumi*, supposing them to be born, must be *sui hæredes*.

Q. What was the effect of a pater-f. nominating by testament a tutor for his emancipated filius-f.?

§ 5. *A.* Of itself the nomination was null, but it was confirmed by the magistrate, without inquiry. So it was, when the act of nomination was void for want of form.

(1) Formerly the Romans had a peculiar *tutela* based on political grounds, viz. over women of full age and *sui juris*.—Gaius 1, §§ 149, 153.

When the nomination was by any person, not the pater-f., it might be confirmed by the magistrate, but only after inquiry, and provided the testator had appointed the pupilus his *hæres*.

TITLE XIV.—OF THOSE WHO MIGHT BE NOMINATED TUTORS BY TESTAMENT.

Q. Who might be testamentary tutors?

Pr. A. None, except those with whom the testator had *testamenti factio*, i. e. persons to whom a testator might make a bequest, which they might acquire for themselves or for others (1). Moreover, such persons must be capable of filling a public office, for tutela is one (2).

Q. Might a filius-f. be tutor?

A. Yes; for there was *testamenti factio* with filii-f., though they acquired on behalf of their pater-f.; and there was capacity to fill public offices; for as to that, they were *sui juris*.

Q. Might a slave be tutor?

§ 1. A. Not whilst he continued so: though there was *testamenti factio* with a slave, for he acquired on behalf of his master, yet he could fill no public office; but a man might nominate his own slave tutor by bequeathing to him his freedom. After Justinian's time, it was unnecessary to bequeath freedom expressly, for the act of nomination sufficiently proved the wish to enfranchise (3), since none but a freeman could be tutor. But the nomination was void, if the testator named one of his slaves under the belief that he was free, because no intention to enfranchise could be presumed, when the slave was supposed to be already free. So it was, if the terms were *cum liber erit* (when he shall be free), for this negated any intention to enfranchise.

Q. Might the slave of another be named tutor?

§ 1. A. Yes, if the terms were, *when he shall be free*; and this condition was implied, unless it appeared that the testator intended the nomination to be absolute, for then it was void.

(1) Tit. Legacies.

(2) Hence women could not be tutors, though, sometimes, by permission of the Emperor, they acted as such.

(3) Prior to Justinian, freedom could not have been directly given; but there would have been a *fidei commissum*, or trust, which would have bound the *hæres institutus* to enfranchise.

Q. Could a *furiosus* (lunatic) or one under 25 be a tutor?

§ 2. A. Yes; after the one had recovered his reason, and the other attained 25. This condition was implied, until proof to the contrary was given.

Q. In what terms might a tutor be nominated?

§ 3. A. Absolutely or conditionally, until (*ad*) or to begin from (*ex*) a limited period.

Q. Might the nomination of the tutor precede the appointment (*institutio*) of the *hæres*?

A. Every valid testament must contain an *institutio*. By the old law, all dispositions in the will prior to this were null; the Sabinians, therefore, held, that the nomination could not precede the *institutio*, but the Proculians allowed an exception here, on the ground that the nomination of a tutor takes nothing from the *hæreditas* (estate) and puts no charge upon the *hæres*; and Justinian, adopting this view, laid down the general rule that it did not matter whether a disposition in a testament occurred prior or subsequent to the *institutio hæredis*.

Q. Could the testator confine the guardianship to one article, or to a special business?

§ 4. A. No; for that would have been at variance with the very essence of the tutorial power, which was attached to the person, not the property of the pupillus, for it was only as a necessary result of the tutor's protection over the person, that he extended his care over the property. But, if the *pupillus* had goods in different provinces, a tutor might be named for the property in each; this, however, is rather a division of the management than of the tutela.

Q. If a tutor was named by a testator for his *sons* or *daughters*, did that include *postumi*?

§ 5. A. Yes; but not grandchildren (*nepotes*); it would be different if the term had been *liberi* (issue); *poster*i (posterity), includes all the issue born or posthumous. The meaning, however, of these terms, varies with circumstances.

TITLE XV.—OF THE LEGAL GUARDIANSHIP OR TUTELA OF THE AGNATI.

Q. When were the Agnati tutors?

§ 2. A. The Twelve Tables made the Agnati tutors, when the pater-f. died intestate as to tutors, *i. e.* made no testament at all, or none naming tutors; or when the tutor named died before the testator.

Q. When the testament named the tutor for a future time (*ex*), or conditionally, did the *Agnati*, in the meantime, assume the guardianship as *tutores legitimi*?

A. No: it passed to a *tutor dativus*, *i. e.*, named by the magistrate. In general, as long as there might be a tutor by testament, there could be none by law (*legitimus*). If the testament named one for a limited time (*ad*), there would be tutors *legitimi* at the close thereof; for the pater-f. died intestate, in fact, as to the remaining time, *i. e.*, until the pupillus reached maturity.

Q. Who were *Agnati* of a Pupillus?

A. Those who on the death of the pater-f. were, together with the pupillus, in the power of the deceased.

Q. Was the tie uniting persons under the power of a pater-f. quite severed by his death?

A. No. All who became *sui juris* by the death of a pater-f. became each the head of a separate family (*domus*); but they continued to form one general family, the members of which were each and all *Agnati* (1).

Q. Is this Justinian's definition of *Agnati*?

§1. *A.* No: he says they are persons related to each other through males. But this definition, though correct in so far as it excludes from the class of *Agnati* persons related through females (2), is too wide, since there may be persons related to me through males who are not my *Agnati*. For (§ 3) a man may cease to be *agnatus* without ceasing to be *cognatus*.

Q. Were all the *Agnati tutores legitimi* at once?

(T. 16, § 7). *A.* No: Tutela (like succession) went to the *agnatus* or *agnati* nearest in degree.

(1) Hence the double meaning of *familia*: *nomen*, the general family, was divisible into particular families, and these were again divisible. Thus the Cornelian family consisted of six particular families: that of the Scipios, Lentulus, Sylla, &c. That of the Scipios was subdivided into four houses (*domus*), the heads of which were *Scipio Africanus*, *Scipio Nasica*, *Scipio Hispanus*, and *Scipio Asiaticus*. The members of these particular families were *agnati* to each other; for if the common ancestor had been alive, they would all have been subject to his power.

(2) For the children of a woman, though she is a member of the same family with me, are not members of it. They belong to their father's family (§ 1). Hence they are only my *cognati*.

TITLE XVI.—OF DIMINUTIO CAPITIS.

Q. Define *diminutio capitis*.

Pr. A. It is the loss of one of the elements which constitute the status of a Roman citizen. Now, of these there were three: liberty, citizenship, and family (1); hence, three *diminutiones capitis*: *maxima* (greatest); *media* (middle); and *minima* (least).

Q. In what cases was there *maxima d. c.*?

§ 1. A. When a citizen lost his liberty. For the loss of that involved the other two, citizenship and family.

Q. In what cases was there *media d. c.*?

§ 2. A. When a citizen lost his citizenship but retained his liberty; as when a man was forbidden fire and water, or *deportatus in insulam*. The loss of citizenship always involved that of family.

Q. In what cases was there *minima d. c.*?

§ 3. A. When a citizen changed his family, but retained his liberty and citizenship; as when a *pater-f.* entered a family by *adrogatio*, or *legitimatio*, or when a *filius-f.* was emancipated or adopted (2).

Q. Explain the phrase *diminutio capitis*.

A. Whenever a change of status took place, the family, the state, or body of freemen was diminished by a head. Now, what might properly have been said of the state, was said of the individual, and the person causing the diminution was called *capite minutus*.

Q. Did the enfranchisement of a slave create a *diminutio capitis*?

§ 4. A. No: the slave having no family (*nullum caput*), ceased to be under his master's power without causing any *dim. cap.*

Q. When a senator was deprived of his dignity, did that cause any *dim. cap.*?

§ 5. A. No: dignities were mere accessories belonging to some persons and not to others, and were not essential to Roman citizenship.

(1) No citizen without liberty, citizenship, and family, of which he must be either the chief or a member.

(2) In cases of *maxima* or *media d. c.*, the status of a Roman citizen was destroyed (*amittitur*, § 3); in *minima d. c.*, it was continued, though modified by the family being changed (*commutatur*, § 3 t. 15).

Q. What effect had *dim. cap.* on the titles *Agnati* and *Cognati*?

§ 6. A. The title *Agnatus* (1) was lost by any *dim. cap.*; for, being common to every member of the same family, it must cease to belong to any one who ceases to be a member, even by the *minima d. c.* But the title *Cognatus* being independent of family, did not cease to belong to one unless he suffered the *maxima* or *media d. c.*; and then, only in this sense, that the tie of blood, which was strictly indissoluble, ceased to produce those civil consequences which were its ordinary result.

TITLE XVII.—OF THE LEGAL GUARDIANSHIP OF PATRONS.

Q. On whom was this *tutela legitima* cast?

A. The rules as to the legal guardianship of *Agnati* could not apply to a freedman *pupillus*; for, having been a slave, he could have no *Agnati*, on being enfranchised; but, in accordance with the spirit of the Twelve Tables, the patron and his children became the freedman's tutors.

Q. Why the *spirit* of the law of the Twelve Tables?

A. Because that law contained no express provision as to the guardianship to be exercised by patrons: but this guardianship called *legitima* was the effect of a construction founded on the spirit of the law, just as if it had been expressly ordained. For, in case of *Agnati*, the nearest of them, who was called to the guardianship, was also the successor of the *Pupillus*, when he died. From this the *prudentes* concluded that the intention of the law was to impose the guardianship on him, who had hopes of succeeding to the property of the *pupillus*, since he had an obvious interest in protecting it. Now this same law cast upon the patron, and then upon his children, the right to succeed his freedman who died intestate; therefore it was assumed to have the further intention of casting upon the same persons the guardianship.

Q. Was the legal guardianship always cast on the presumptive successor of the *pupillus*?

(1) That is generally (*plerumque*, t. 15, § 3). This Tribonian added, because after Anastasius one emancipated was still the *agnatus* of his brothers and sisters, B. 3, t. 2.

A. Yes; unless he was incapable of exercising it, as in case of a woman, or a person under twenty-five.

TITLE XVIII.—OF THE LEGAL GUARDIANSHIP OF ANCESTORS.

Q. On whom was the legal guardianship of a filius-f. cast?

A. On the pater-f., who emancipated the boy under fourteen, or girl under twelve, over each of whom he had all the rights of a patron (p. 37).

TITLE XIX.—OF TUTELA FIDUCIARIA.

Q. When the emancipating ancestor died, leaving no tutor by his testament, who was tutor of the emancipated impubes?

§ A. The other filii-f. (males, and above twenty-five), who remained under the emancipator's power. This was the tutela fiduciaria.

Q. Why was it not called legitima, as when the patron's children were tutors?

A. The text says, because the patron transmitted to his children the legitima tutela of the freedman, as he would have transmitted to them the dominica potestas over the same freedman, had he not been enfranchised; whereas, had the filius-f. not been emancipated, the ancestor would not have transmitted the patria potestas to those to whom such ancestor, on death, did in fact transmit the tutela of the emancipated filius-f. But this will not hold; for though it is true that his brothers and uncles (who might be tutores) would not have had the patria potestas on the pater-f.'s death, still in the case where a grandfather emancipated his grandson and died, the father became tutor fiduciarius of his own child, and yet it is clear that, had there been no emancipation, this grandchild would have come under his father's potestas; so that here, had the filius-f. not been emancipated, the ancestor, i. e., the grandfather, would have transmitted the potestas to the same person, viz. the father, to whom it was in fact transmitted. The true account is probably this: the term tutela legitima applied only to a guardianship *directly* created by the law of the Twelve Tables, or derived *indirectly* from its rules as to the succession to property.

Thus, although that law did not expressly name the patron and his children tutors of the freedman, it did so impliedly by naming them successors to the freedman's property; whereas it said nothing of the rights of emancipators generally, or of the issue of emancipating ancestors, to succeed to or be guardians of emancipated filii-f. In short, a special name was given to tutela *fiduciaria*, because it could not have been included under tutela *legitima* (even in its widest sense), except by reason of the faint analogy existing between those rights of patronage, which were impliedly sanctioned by the express provisions of the law of the Twelve Tables as to succession, and the rights of an emancipating pater-f. and his familia.

Q. Recapitulate the four tutelæ legitimæ.

A. 1. If the pupillus was a freedman, his tutor was his patron, and after him his patron's children. 2. If the pupillus was a free-born filius-f., and had become *sui juris* by the death of the pater-f., without emancipation or diminutio capitis, his tutor was an agnatus; but, 3. If with emancipation and with diminutio capitis first, the emancipator was the tutor legitimus; and, 4. After him there was a tutor fiduciarius.

Q. Did Justinian introduce any change?

A. Yes; as he introduced by Nov. 118 a new system of succession, he of course introduced a new system of legal guardianship.

TITLE XX.—OF TUTORS BY THE ATILIAN, JULIAN, AND
TITIAN LAWS.

Q. In what cases did magistrates nominate tutors? In other words, when was it a case of tutela *dativa*?

Pr. A. 1. When there was no tutor, testamentary or legitimus.

2. When the functions of a testamentary tutor were suspended. Thus, when he was to begin his duties after a certain period, or upon a certain event, a tutor dativus was named in the meantime. So when he was named absolutely, a tutor dativus was appointed till the hæres institutus appeared. So, when a tutor was taken prisoner, a t. dativus was named, whilst it continued doubtful whether by postliminium the captive would resume his guardianship or not. In all these cases the tutor dativus resigned whenever the testamentary tutor appeared, or whenever it became clear that he never would appear, because, *e. g.*,

the condition had become impossible; and then the tutela vested in the agnati, or other legal tutors (§ 1, 2).

3. When the testamentary tutor was excused or dismissed. In this case, though there never could be a testamentary tutor, recourse was not had to a tutor legitimus, but to one dativus.

Q. What magistrates had power by special laws (for it was not within their ordinary jurisdiction) to name tutors dativi?

§ 4. A. At first, in Rome, the prætor urbanus and the majority of the tribunes (1), by virtue of the lex Atilia; in the provinces, the governors, by virtue of the lex Julia and Titia. Later, Claudius conferred the same power on the consuls, and later still, Antoninus Pius on the prætors. These magistrates named the tutor, after inquiring into his character and fortune.

Q. Was there any change, even before Justinian, in this power of nomination?

§ 4. A. Yes: in Ulpian's time this power was exercised, at Rome, by the præfect of the city (2), or by the prætor, (*secundum suam jurisdictionem*), each exercising it over those, subject, in this matter, to his jurisdiction. In the provinces it belonged to the governors; or to the municipal magistrates, when the property of the pupillus was not large, and when the governor declined to nominate himself, and directed these magistrates to do so.

Q. What was Justinian's rule on this matter?

A. It was this: when the property of the pupillus was less than 500 solidi (3), the municipal magistrates, or the *defensores civitatis*, might, without the governor's order, name a tutor without inquiry; but in this case the tutor must give security, which was dispensed with when he was named by the governor after inquiry (t. xxiv. § 5).

Q. When were tutors required to render an account of their administration?

§ 7. A. When they ceased to be tutors, by reason of the pupillus attaining full age; and there was an *actio tutelæ* to compel an account.

(1) The ten tribunes decided nothing, unless they were unanimous; but in order that the impubes might not be left without a tutor, it was thought enough if six of them agreed with the prætor. *Pr.*

(2) His jurisdiction extended 100 miles round Rome; the city (strictly) was included within these limits.

(3) About 480*l.*

TITLE XXI.—OF THE AUCTORITAS OF TUTORS.

Q. What were the duties of a tutor?

A. He either acted by himself without the pupillus, or he acted with the pupillus for the purpose of validating the act by his presence and approbation (1). *Tutores, says Ulpian, et negotia gerunt et auctoritatem interponunt.*

Q. In what cases did the pupillus require his tutor's authority?

Pr. A. There were two periods in pupilage. Until seven years complete the pupillus was an *infans*: he understood nothing; he did, and could be a party to, no act; the tutor represented him, and had sole management of his affairs. After infancy, the pupillus had a certain understanding (*intellectum*), but no judgment (*animi iudicium*); he might, therefore, alone, and without his tutor's authority, make his condition better; but he could not, without such authority, make it worse.

Q. What is meant by making his condition better or worse?

A. It was made better when something was acquired by him, or when another had incurred an obligation to him; it was made worse, when something was alienated, or when the pupillus had incurred an obligation.

Q. Why was the tutor's authority requisite for a pupillus to make his condition worse?

A. Not because every alienation or obligation incurred was of necessity disadvantageous; for, then, the tutor would never have allowed his pupillus either to alienate or bind himself, but because the bare alienation or incurring of an obligation implied a loss, and because the question whether such loss would be compensated by other advantages, was beyond the pupillus, for it required the exercise of judgment.

(1) The tutor's co-operation in some acts of the pupillus gave rise to the phrase, the tutor is *given to the person* of the pupillus. This co-operation completed the person of the pupillus by adding to his will a power which it would not otherwise have had. It was therefore to his *civil* rather than to his *physical* person that the tutor was given. For his education was directed by the magistrate, who decided everything respecting it, the tutor being chargeable with the expense.

Q. What happened when the pupillus made, without authority, a contract involving mutual obligations, as sale, hiring and letting, &c. ?

Pr. A. The party contracting with the pupillus was bound, the pupillus was not. For such contracts contain two acts (purchase and sale, hiring and letting); in the one the pupillus is the person to whom another is bound; this act, therefore, which makes his condition better, and requires only apprehension, is valid: in the other the pupillus is the person to be bound; this act, therefore, which makes his condition worse, and requires judgment, is null. But the rule of law was, that no one should enrich himself at the expense of another; therefore, if the pupillus would not fulfil his part of the contract, he could not compel the other party to fulfil his. In a sale, *e. g.*, he could not claim the thing sold without paying the price. And if the other party had executed his part of the contract, in whole or in part, and the pupillus had thereby derived a benefit, he would be liable to the extent of such benefit (B. 2, t. 7).

Q. Can a pupillus, without the tutor's authority, accept an *hereditas* (*adire hereditatem*), receive it as a trustee (*ex fidei commissio*) (1), or demand *possession of goods* ?

§ 1. A. No: because a man cannot acquire a succession, however valuable, without judgment, in order to estimate the burdens and benefits attached to it.

Q. When and how was the tutor's authority to be given ?

§ 2. A. The tutor's authority consisted in his actively co-operating in the act, so as to augment and fill up the persona of the pupillus (*augere, auctor fieri*); hence it could be given neither before nor after (*statim in ipso negotio*), nor by an agent (*præsens*).

Q. Did the capability which the pupillus, who was no longer an infant, had to join in any act prevent the tutor acting by himself if he thought fit ?

A. No. Still there were cases, such as *Adrogatio*, the

(1) The *hereditas* passed under the civil law. The *bonorum possessio* was the right which the prætor granted to a man to put himself in and to hold possession of an estate (*successio*), to which he was not entitled by the civil law (B. 3, t. 9). *Hereditas fidei commissaria* was an estate (*successio*) received by a *Fidei-commissarius* (*cestui que-trust*) from a *fiduciarius* (trustee), whom the testator had charged to transfer it.

enfranchisement of a slave, the acceptance of an *hæreditas*, when the pupillus must appear personally.

Q. As a tutor could not give his authority in his own cause, how could the pupillus maintain a suit against him?

§ 3. *A.* At first, the prætor used to appoint him a tutor (*prætorian*). Afterwards, they gave him a curator whose functions ended with the suit; and this was more consistent with the rule that a tutor was never appointed for a special business (1).

TITLE XXII.—HOW GUARDIANSHIP WAS ENDED.

Q. How was tutela ended?

Pr. A. 1. By the pupillus reaching puberty, *i. e.*, twelve years complete in the case of women, and fourteen in the case of men. Prior to Justinian, opinions were divided as to males: the Sabinians determined puberty by the physical development of the body; the Proculians by age alone; Priscus insisted on both conditions. But Justinian held with the Proculians, as more consistent with decency. 2. (§ 4, § 1). By the death, or any, even the minima, *diminutio capitis* of the pupillus; for a tutor was given only to one *sui juris*, and an impubes *sui juris*, who suffered even the minima *d. c.*, of course became *alieni juris*. 3. By the tutor's death (§ 3). 4. By the tutor's maxima or media *d. c.* (§ 4); for every tutor must be capable of holding a public office, and therefore must be a citizen. The only effect of a tutor suffering the minima *d. c.* was to put an end to a tutela legitima agnatorum (§ 4), for that was the only guardianship dependent on the family, which, of course, was broken by the tutor leaving the family. 5. As to testamentary tutors, they ceased when the period expired, or the condition happened which limited their tutela (§ 5). As to tutores dativi, they ceased when the period expired or the condition happened which suspended the testamentary tutors (§ 2) entering into office. 6. (§ 6). By excuses, made by tutors and admitted by the magistrate, or by a sentence of dismissal (t. 25, 26).

(1) By Nov. 72, no creditor or debtor of the pupillus, except the mother, could be a tutor; and if a party after becoming tutor became his creditor or debtor, a curator was to be added during the whole guardianship. Hence the special curator alluded to in the text could scarcely ever be required.

TITLE XXIII.—OF CURATELA OR CURATORSHIP.

Q. Amongst persons *sui juris*, who might be subject thereto?

A. 1. Impuberes, whose tutors were unfit for their duty, or who had been excused for a time from the tutela; for if a person had one tutor, he could not have a second (§ 5). 2. Adolescentes (puberes and under twenty-five.) (Pr.) 3. Furiosi and prodigi (spendthrifts) under interdict, though above twenty-five (§ 3); lunatics and persons suffering under incurable disease (§ 4), or deaf or dumb.

Q. What could a tutor do, if from ill health or other cause he found himself unequal to manage his pupil's affairs?

§ 6. A. Assuming that it was not a case for a curator, the prætor would appoint him an agent (*actorem*), who should manage at the risk of the tutor; but such agent was indispensable only when the pupillus was absent or an infant, for otherwise he might himself, with the tutor's authority, appoint a procurator.

Q. Were adolescentes forced to have curators?

A. No: generally, persons of age were deemed capable of managing themselves and their property, and therefore could not be compelled to have them; but they were granted, when applied for, to those who felt incapable by themselves of managing their property. There were, however, three cases in which curators were forced upon adolescentes: 1. When they were parties to a suit (§ 2). 2. When they had a payment to receive. 3. When their tutors had to render their accounts. In any such cases the debtor or the tutor was entitled, if not to nominate, certainly to refuse paying the adolescens until he nominated a special curator—the object being to bar any renewal of the suit, and to avoid any question as to the payment or the accuracy of the account (1).

Q. Could a person under twenty-five, who had once obtained a curator, reassume the management of his property before twenty-five?

A. No: unless the emperor granted him a *dispensatio ætatis*.

(1) The prætors introduced in favour of adolescentes the *restitutio in integrum*, which avoided any act by which they were damaged. The lex Plœtoria, probably the first which divided the puberes into two classes, subjected to infamy any one who took fraudulent advantage of an adultus. *Perfecta ætas* was 25.

Q. In whom did the curatela vest?

§ 3. § 1. A. That of lunatics and spendthrifts was alone legitima, being vested by the Twelve Tables in the Agnati (1); in other cases the curators were named by those magistrates who named the tutors; though curators were not to be named by testament, still if so named they might be confirmed by the magistrates.

Q. Were not the curators of lunatics and spendthrifts generally dativi, *i. e.*, appointed by the magistrate?

§ 3. A. Yes (solent): for not merely might such persons have no agnati, or none capable of acting as curators, but by the Twelve Tables the agnati were never curators, unless the lunatics or spendthrifts were the legal representatives of a pater-f. who had died intestate; in all other cases they were dativi.

Q. What were the duties of a curator?

A. Unlike the tutor, he was given, not to the person but to the goods, and often for a particular business; for every one of full age was capable of acting and binding himself (2) alone. Curators, however, as guardians of the property of adult lunatics, &c., were required to give their co-operation and sanction; and, when the persons in curatela were totally incompetent to act themselves, to appear for them as their attorneys.

TITLE XXIV.—OF THE SECURITY (CAUTIO) TO BE GIVEN BY TUTOR AND CURATORS.

Q. Was any security taken for the proper conduct of tutors and curators?

A. Yes: amongst them we find, 1. The security to be furnished by them before beginning to act, without which no act of theirs was valid. 2. The inventory to be prepared before they took office. 3. The implied hypothecation or charge on all their goods. 4. The oath required by Justinian (Nov. 78), to administer the goods, like a good pater-f.

(1) The curatela was not, like tutela legitima, bestowed on these because they might succeed to the property; for the lunatic or spendthrift might have children who would exclude agnati, whereas impuberes could have none. And though the express provision as to agnati being tutors was by construction extended to the patron, this rule was not extended to the case of curators.

(2) If not an absolute idiot, an adultus might marry without the aid of the curator.

Q. Were there not various kinds of cautiones? Which of them was required of a tutor or curator?

Pr. A. *Cautio* (*cavere*) means any guarantee or security. A promise by word or by writing, or a pledge, are cautiones; an oath is a *cautio juratoria*. When a third party comes in and adds his personal obligation to that of the principal debtor, there is the *cautio*, called *satisfactio* (1), and this was the one furnished by tutors and curators.

Q. Were all tutors and curators compelled to give security?

Pr. A. No: the exceptions were: 1. Testamentary tutors, for their fidelity and diligence were guaranteed by the testator's choice. 2. Tutors and curators named by their father's testament, when the nomination required confirmation; but there was no exception when they were not named by the fathers but by some one else. 3. Tutors and curators *dativi* appointed after inquiry (2).

Q. Were *tutores legitimi* always obliged to give security?

A. Always, in strictness; but the *prætor* sometimes relieved the father and patron.

Q. Might it not happen that some tutors and curators within these exceptions had to provide securities?

§ 1. A. It might, when several tutors or curators were appointed together; for then there was only one, called *onerarius*, who managed, the others being *honorarii*, without any active share, but still responsible to the *pupillus*. Any one of the tutors or curators might, by tendering security, compel his colleague to leave the management in his hands, or to furnish security himself, if he wished to undertake the management.

Q. If no one offered security, who selected the manager?

(1) It consisted in furnishing a *fidejussor* (B. 3, t. 20), i. e., one bound by stipulatio to answer for the conduct of the tutor or curator. The form was this:—First, the tutor or curator was asked, *Promitterne rem pupilli salvam fore?* He answered, *Promitto*. Again, the *fidejussor* was asked, *Fidejubeas rem pupilli salvam fore?* He answered, *Fidejubeo*. But who put these questions?—The *pupillus* or the *adultus*. For the right of action (*actio ex stipulatu*) belonged to the party who received the answer. If the *pupillus* could not speak, or was not present, one of his slaves put the questions, because they acquired for their masters. If he had no slaves, a public slave acted. These stipulations were *communæ*, i. e., enforced either by the *prætor* or *judex* (B. 3, t. 18).

(2) The superior magistrates alone did this (t. 20, *prope fin.*).

§ 1. *A.* Unless that had been done by the testament, the majority of the tutors or curators, and, if they disagreed, the magistrate.

Q. Might the management be divided amongst the joint-tutors and joint-curators?

A. Yes: either by the terms of the appointment or at their own request, each undertaking a particular district or distinct portion. In this case the responsibility was not joint but several.

Q. How were tutors, wrongfully refusing, compelled to furnish security?

§ 3. *A.* By a seizure of their goods, which were kept as a pledge; if they still refused, they were deemed suspect (t. 26).

Q. Who was responsible for the sufficiency of the security?

§ 2. *A.* The magistrate who accepted it; à fortiori he was responsible when there was no security at all, for his duty was to have it provided.

Q. Did this *actio subsidaria*, which lay against the magistrate, lie against his legal representatives?

§ 2. § 4. *A.* According to the *Responsa Prudentum* and the Imperial Constitutions it did, in case of gross negligence. However, it lay only against inferior and not against superior magistrates; for it was not part of their duty to see security provided.

TITLE XXV.—OF THE EXCUSES WHEREOF TUTORS AND CURATORS MIGHT AVAIL THEMSELVES.

Q. Was there any means of being relieved from guardianship or curatela except a lawful excuse?

A. None: for they were public duties.

Q. State the lawful excuses common to tutela and curatela.

Pr. A. 1. The number of children: three at Rome; four in Italy; five in the provinces; but all must be alive, or must have fallen in battle. Children in the womb or adopted were not reckoned; those adopted or emancipated were reckoned by their natural father, for this excuse was in favour of population, and had no reference to the patria potestas. Grandchildren represented their deceased father.

2. The management of the treasury. This was first allowed as an excuse by Marcus Aurelius in his *Semenstria* (1).

(1) The earlier emperors devoted six months a year to the ad-

Fiscus was the private treasury of the emperor, and was distinct from *erarium*, the public one; but in later times they were united, and the excuse was available for a manager of either (§ 1).

3. Absence on the service of the republic. This was a permanent excuse, when the tutor or curator was appointed in his absence, or within the year after his return; it was temporary only when he had been appointed previously, a curator being appointed till his return (§ 2).

4. The holding a magisterial office. This would relieve a man from undertaking a *tutela*, but would not avail him so far as to allow him to resign after accepting it (§ 3).

5. A suit between the tutor or curator and the pupil or minor, if the question affected nearly all the goods of either, or a *hereditas* (§ 4).

6. Three *tutelæ* or *curatelæ*, or even one, if complicated. The difficulty rather than the number was the point; but the party alleging the excuse must not have applied for the office (§ 5, 9).

7. Poverty; for both the offices in question were filled gratis, and would have been too burdensome for a poor man. M. Aurelius and Lucius Verus (*divi fratres*) introduced this provision (§ 6).

8. Disease. Whether this excuse was to avail permanently or for the time, depended on the character of the complaint (§ 7).

9. Want of education, if such as to incapacitate for business (§ 8).

10. A nomination as tutor, from a spiteful desire to impose a burden: the being unknown to the testator was nothing (§ 9, 10).

11. *Inimicitia capitalis* of tutor or curator against the father of the pupilli or adulti, or against the adulti themselves, there having been no reconciliation (§ 11).

12. A suit as to the status of the tutor by the pater-f. (§ 12).

13. The age of seventy. The being under twenty-five was good for the time. But Justinian made this last an absolute incapacity (§ 13).

The same rule applied to idiots, to deaf and dumb.

14. The military profession (§ 14).

15. A liberal profession exercised in a man's native country, or in Rome, which was the common country,

ministration of justice and the making of laws. Their collected decisions were called *senenstria*.

such as law, medicine or rhetoric. In provincial towns the number of persons so exempt was limited (§ 15).

Q. What excuses were peculiar to curatela?

A. One who was tutor could not be compelled to be curator of the same person: nor a husband to be curator of his wife, even though he had interfered in the management of the property (1) (§ 18, 19).

Q. When and how were excuses brought forward?

§ 18. A. Before the magistrate (2), within fifty running days, if the party dwelt less than one hundred miles from where the tutor or curator was appointed; but if he dwelt beyond the hundred, there was a fixed period of thirty days plus one day for every twenty miles beyond the one hundred; the time allowed, however, must never be less than fifty days: for otherwise it might be that a person two hundred miles off would have had only thirty-five days; whereas one less than one hundred miles off would have had fifty.

Q. When did the time begin to run?

§ 16. A. The day on which the tutor or curator knew of his appointment or of its confirmation.

Q. The first excuses being rejected, might others be proposed?

§ 16. A. Yes: within the given time.

Q. Were any excuses available for part of a tutela or curatela?

§ 17. A. No: the rule was, that the excuse must be for the whole: but in like manner as the management might be divided, so sometimes there might be a partial excuse.

Q. Was the tutor or curator whose excuse was false, discharged from responsibility?

§ 20. A. No: the allowance of such excuses was absolutely void—an exception to the rule that a judgment founded on false grounds must be reversed.

TITLE XXVI. OF TUTORS AND CURATORS SUSPECTI.

Q. When was a tutor or curator *suspectus*?

§§ 5, 12, 13. A. When he was unfaithful in performing his duties, or of bad character (t. 23, § 5).

(1) An exception to the principle that a party by interfering waived the excuse. Again, the excuse was waived by a previous promise to the pater-f., to the tutor, to his children, or by allowing the period to elapse within which the excuse must be presented.

(2) The tutor *dativus*, instead of appealing to a superior magis-

Q. Would the solvency of a suspectus, or the security he might tender, stop any charge against him?

§§ 12, 13. **A.** No: fidelity and good character are the only things regarded in a tutor or curator. Hence, poverty is no ground of suspicio.

Q. By what law was a tutor or curator suspectus sued? And what is the object of such suit?

§ 8. **A.** By the law of the Twelve Tables: the object being to remove them from office as unfaithful officers. Hence, when the duties of the suspectus ceased, *e. g.*, by his death, the suit also ceased; for its end was attained.

Q. Before what magistrate was this suit?

§ 1. **A.** The prætor at Rome, the governor or legate of the proconsuls in the provinces.

Q. Might any class of tutor become chargeable as suspectus?

§ 2. **A.** Yes: but if the tutor was patron of, related to, or of affinity with the pupillus, his reputation was to be considered; and instead of being removed, a curator was associated with him, and even when removed he was spared the infamy commonly attached to suspecti found guilty of fraudulent malversation.

Q. Who might make the accusation?

§ 3. **A.** Any citizen, for the accusation was public: even women, if they were moved by affection for the pupillus: for otherwise the magistrate would not have allowed them to lay aside the reserve which becomes the sex.

Q. Might impuberes accuse their tutors?

§ 4. **A.** No: for they could not judge of their conduct.

Q. Might puberes accuse their curators?

§ 4. **A.** Yes: by the advice of their relations.

Q. Did the suspectus cease to manage during the suit?

§ 7. **A.** Yes.

Q. What punishment attached to the suspectus when dismissed?

§§ 6, 11. **A.** Infamy, when he was removed for fraud; it was not so severe in case of mere negligence (1). If the

trate against the nomination, appeared before the magistrate who nominated, reserving an appeal if he rejected his excuses.

(1) *Existimatio* was the whole set of qualities making up, by law and custom, the honourable citizen: *dignitatis illasæ status legibus ac moribus comprobatus*. This was entirely lost when a man ceased to be a citizen; and was greatly impaired if he suffered infamy by reason of certain *facta* as judgments against him, to which the law and the prætor's edict attached this result.

suspectus was a freedman convicted of having acted fraudulently as tutor of his patron's children, he was delivered over to the *præfectus urbi*, for punishment. The same thing was done with those who had bribed the clerks of the magistrate to get themselves named tutors (1). And they were sent before the *præfectus*, because it was his office to punish, and the *prætor*'s to remove the suspectus.

Q. If the tutor did not appear (*copiam sui facere*) in order to have alimony decreed to the pupillus, might he not be removed as suspectus? But first explain having alimony decreed.

§ 9. A. The *prætor* was bound, looking to the pupil's means, to fix the character and amount of his expenses: *decernere alimenta*. For this purpose, therefore, the tutor was bound to appear and declare the exact amount of the pupillus' property. The tutor not appearing, he might be removed as suspectus. The pupillus was put into possession of his tutor's goods (2); and if any of them was likely to be depreciated, a curator was named to sell them (3).

Q. What if the tutor appeared and falsely alleged that the pupil's means would not allow alimony to be decreed?

§ 10. A. He would be removed as suspectus, and delivered to the *præfectus urbi* for punishment.

Infamous persons were subject to various disabilities, *e.g.*, they could fill no public office.

(1) *Qui tutelam corruptis ministeriis prætoris redemerit* (D. 26, 10, l. 3, § 15). This is not to resign the tutela for money, but to purchase or obtain it by corruption, in order to abuse it.

(2) *Vide* B. 3, t. 12, as a creditor was of the debtor's who disappeared, and could not be brought before the magistrate.

(3) Just as in all cases of forced sales of particular things. Probably this sale was to supply the pupil's immediate wants.

BOOK II.

TITLE I.—OF THE DIVISION OF THINGS (RES) AND OF THE ACQUISITION OF PROPERTY.

Q. DEFINE *Res*.

A. All physical and metaphysical existences, in which persons may claim a right.

Q. How are they divided?

Pr. A. Into *Res* within our *patrimonium*, and not within our *patrimonium*. The former are things belonging to individuals (*singulorum*), and are called *bona* or *pecunia*. The latter are of four kinds: 1st. Common (*omnium*); 2nd. Public; 3rd. Belonging to a corporation (*universitatis*); 4th. Belonging to nobody (*nullius*).

Q. Define things common.

§ 1. A. Those, whereof the property belongs to nobody, but the right of using them to everybody, and whereof a portion may become the property of the first occupant; e.g., air, running water, the sea, and its shores (1). Thus the water drawn by me from the stream, the place occupied by my ship in the sea, or by my tent on the shore, are mine so long as I retain possession, but no longer (§ 5.)

Q. What does the sea-shore include?

§ 3. A. All the land covered by the highest winter-tide.

Q. Define things public.

§ 2. A. Things are public when the right to use them is in all, but the property is in the public, e.g., rivers and harbours (2).

Q. Are the banks of a river public?

§ 4. A. No: the use of them is in the public, but the property is in the riparian proprietor. Thus, any one

(1) Wild beasts and fish are common.

(2) Thus, prætorian or consular roads, public *places*, lakes, ponds, are things whereof the property is in the public. Things *public* differ from things *common*, not as regards the use to be made of them, but merely in this, that no one can acquire property in a public thing by occupation; for occupation confers property in such things only as belong to nobody.

may land on the bank, discharge his freight, or tie his cable to the trees there, but he does not become proprietor of the place thus occupied for the time. Nor has he the right to cut rushes or grass, or to take the fruit of the trees; for these belong to the riparian proprietor. In this respect river banks differ from the sea-shore, for that is the property of nobody (1).

Q. Define *res universitatis*.

§ 6. *A.* Things whereof the property is in a corporation, and the right of using them in all its members; e.g., theatres, and the stadia of a city. But no corporation or association was recognized as a legal person, unless it was lawfully authorized for the purpose.

Q. Were things which belonged to the public or to a corporation, but which were not to be used individually by each citizen or each member of a corporation, public, or *res universitatis*?

A. No. Thus, the funds, or the claims, or the slaves belonging to the public or to a corporation, not being at the disposal of each individual, but of the whole body, considered as a legal person, were not *public* or *res universitatis*; such things were, properly, in *patrimonio populi, vel universitatis*: though, to distinguish them from private property, they were sometimes said to be public.

Q. Explain *res nullius*.

§ 7. *A.* Things *common* are sometimes said to be *res nullius*, because, until occupied, they belong to nobody; but *res nullius* (proper) are things which do and can belong to nobody, being things of divine right (*divini juris*). They consist of, 1. *Res sacra*; 2. *Religiosæ*; 3. *Sancta*.

Q. Explain *res sacra*.

§ 8. *A.* Things consecrated to God by the pontifices, with the authority of the emperor (2).

Q. Could things *sacra* be alienated?

(1) Its occupants, however, must not injure the landing or navigation. Now, as the magistrate was sole judge of any inconvenience which might arise from any occupation of the shore, no part of it could be appropriated without his authority; and in this respect the sea shore was *res publica*.

(2) Prior to Christianity, *sacra* were things consecrated to the gods above, and *religiosæ* things abandoned to the gods below. The authority of the legislature was always required to make a thing *sacrum* (§ 8). In Ulpian's time the emperor being supreme pontiff, and having also legislative power, might himself consecrate a thing, or authorize its consecration.

§ 8. *A.* No: they were withdrawn from commerce. Justinian, however, allowed vases and other sacred furniture to be alienated when captives were to be redeemed, or the poor to be fed in time of famine, or church-debts to be paid.

Q. When a *sacred* edifice had been destroyed or gone to ruin, was the ground saleable?

§ 8. *A.* No; it continued *sacred*.

Q. What are things *religiosæ*?

§ 9. *A.* Burial places. Any person might, without authority, make a piece of ground *religiosum* by burying a body in it, provided that he was proprietor, or had the consent of all the co-proprietors, or of those having an usufruct or servitus therein (1); but, otherwise, the piece of ground continued *purum* (2); nor could it become *religiosum* until the consent of the parties interested had been obtained.

Q. What are *res sanctæ*?

§ 10. *A.* Things protected by a penal *sanctio* from injury by man: the *sanctio* being that part of a law which imposes penalties on those who break it. The walls and gates of Rome were *sanctæ* (*de sancire*), and it was death to him who injured them (3).

Q. What is the most absolute right we can have in things *nostro patrimonio*?

A. *Dominium*, or ownership; this gave the absolute power over a thing (*plenam in re potestatem*, B. 2, t. 4, § 4), and made it our own. Hence, by putting the effect for the cause, *dominium* and *property* became synonymous.

(1) A person had the right to bury in a common sepulchre, in spite of the proprietors (§ 9); but not to make a sepulchre in common land. It would seem, therefore, that a *locus religiosus* might belong to an individual; but this is true only so far, that one or more might have an exclusive right to bury their dead in such place; which right was transmissible by descent, or to the purchaser of the land where the *locus religiosus* was. Still, such *locus* was not *in commercio*; nor could it form the principal subject-matter of a sale or contract; nor could the landlord, after the purposes for which a sepulchre was used, carry away the remains of the dead.

(2) *Locus purus* is a place neither *sacrus*, nor *religiosus*, nor *sanctus*.

(3) *Res sanctæ* were not strictly *juris divini* (§ 10), but were considered so because they were not *in commercio*, and were surrounded by a kind of legal sanctity.

Q. What elements are involved in Dominium?

A. It involves: 1. The right to occupy a thing, and to extract from it all its uses or services (*usus*). 2. The right to take all its fruits (*fructus*). 3. The right to dispose of it, either by alienating or destroying it (*abusus*) (1). 4. The right to claim it back from whosoever detains it (*vindicatio*). But the exercise of these several rights must be within the limits of law. Hence the definition, *dominium est jus utendi, fruendi, et abutendi, quatenus juris ratio patitur*.

Q. How was dominium or property acquired?

§ 11. A. By the law of nature (*jus gentium*), or by the civil law.

Q. How by the law of nature?

A. In one of three ways. By *occupatio*, *accessio*, or *traditio*. If the texts are carefully examined, it will be found that *accessio* is not expressly classed as one of the modes of acquiring the dominium; it is regarded rather as incident to property already acquired, than as a new acquisition (2). It has been observed also that *occupatio*

(1) *Abuti* does not mean to ill-use (*male uti*), but it is opposed to *uti*, and means to make a specific use of a thing; e. g., to eat an ox. *Usus* denotes a continuing use, for it allows the thing to exist, as when an ox is used to plough.

(2) This is Ducaurroy's opinion. Lagrange agrees that *accessio* does not transfer the property, for he says, that the thing added, instead of being *transferred*, is annihilated, or incorporated with the thing to which it is added. Thus, if I build a house on my land with another man's materials, the materials cease to have any separate existence: they are incorporated with the land; but, the moment they resume their original condition, by being separated, they are recoverable by the original owner. *Accessio* is, as it were, one of the fruits of property. Hence he says property is acquired by *occupatio*, is increased by *accessio*, and transferred by *traditio*. Ortolan considers *accessio* as a distinct mode of acquiring property, and as, in fact, a mode of *occupatio*. He says it is an addition made *by a thing itself*. Now if the thing added has no owner, e. g., if a wild pigeon comes to my dovecot, the dovecot has, without any effort on my part, attracted, or *occupied*, or appropriated this animal; or if the addition, as in case of *alluvio*, has been so gradual, that it is impossible to distinguish the origin of the several particles constituting the addition, such addition is substantially formed by things without an owner; but lastly, if the addition consists of things belonging to another, as in case of a house built of another man's materials, it will appear from the cases, that the property taken has either been so completely incorporated with something else that it cannot be separated, and must

and *traditio* (1) are only different names for possession ; the former being applied where possession is taken of things having no owner ; the latter, where possession is transferred from an owner. Hence we conclude, that by the *jus gentium* there is only one mode of acquiring the ownership, i. e., *possessio*.

Q. What elements are involved in *possessio* ?

A. It involves : 1. The physical hold of a thing. 2. The will to hold it as proprietor. Thus, a hirer, a borrower, a *mandatarius*, though they have physical hold of the thing (*nuda detentio, naturalis, or corporalis possessio*), have no possession (proper), (*possessio, civilis or juris possessio*), because they have no intention to hold as proprietors (*animus possidendi or dominii*). So lunatics or infants are not possessors, though they are holders, because, from weakness of understanding, they cannot have the intention of possessing as proprietors (*intellectus possidendi*) (2).

Q. What things are acquired by *occupatio*, i. e., by simply taking possession ?

§ 12. A. None but things having no owner, i. e., things common, as wild beasts, birds, fish. Every animal, in its natural, free condition, becomes the property of the first taker, whether he take it on his own or on another's land ; but, of course, the owner of the land may prohibit everybody from entering it, and may claim indemnity for any damage occasioned by his doing so. For wild animals do not belong to the owner of the land in which they happen to be.

Q. How long does a man retain his property in such animals ?

§§ 12, 13. A. Whilst he continues in possession ; when-

be considered as destroyed, or that the law, from views of public convenience, refuses to allow the separation.

(1) *Traditio* is a complex fact, and includes both the giving up and the taking possession. But still it is by the possession that the person to whom the delivery (*traditio*) is made acquires the property. If a thing have no owner, the mere taking possession vests the property in the possessor ; but if a thing has an owner, the taking possession does not vest the property in the new possessor, unless the owner gives his consent. To distinguish between these two cases, the terms *occupatio* and *traditio* were invented.

(2) Sometimes the texts contrast *in possessione esse* with *possidere*. The former denotes the bare possession (*nuda possessio*), and there is the same difference between them as between *in libertate esse, in servitute esse, and liber or servus esse* (vide B. 1, t. 4).

ever they escape they resume their original condition, and, if re-taken, belong to the new taker. They are held to be out of our possession, when out of sight, or, even though within sight, when pursuit has become difficult.

Q. When does the property in an animal wounded in the chase vest?

§ 13. A. Not until you have taken it; for until then it is uncertain whether you ever will take it. Justinian rejected the opinion that a man continued proprietor so long as he pursued a wounded animal.

Q. Are bees wild animals?

A. § 14. Yes: both they and their honeycombs, therefore, belong, not to the owner of the tree where they have settled, but to him who first hives them.

Q. How long did a man hold the property in bees thus hived, and, generally, in animals, which, though naturally wild, as pigeons, peacocks, and stags, have been tamed and acquired habits of going and returning?

§ 15. A. Until they lost the *animus revertendi*; and they were presumed to lose the intention when they lost the habit.

Q. Was it not by *occupatio* that property in prisoners of war was acquired?

§ 17. A. Yes; and a man kept his property in them just so long as he kept them in his possession.

Q. May not the effect produced by losing possession of things acquired by *occupatio* be regarded as a consequence of the right of *postliminium*?

A. Yes: for the man who takes fish or game, or occupies the shore, is like an enemy making conquests over the original state of the world—conquests which disappear when the natural order of things is restored.

Q. Did the above rules of law apply to fowls and other domestic animals?

§ 16. A. No: being by nature subject to man, the right of *postliminium* is not applicable to them; hence, property in them is not lost with the possession, and he who keeps a fowl which has escaped out of my court-yard is guilty of theft.

Q. Are inanimate things acquired by him who takes possession thereof?

§ 18. A. Yes, if they have no owner. Thus, precious stones and such like, found on the seashore, belong to the first finder.

Q. Define *accessio*.

A. It is the enlargement of a thing by the union of some

accessary. The proprietor of a thing acquires by *accessio* all its fruits, and whatever, without any act of his, becomes attached to and incorporated with it. Hence the rule *accessio cedat principali* (1).

Q. Give instances of *accessio*.

§ 19. A. Thus, the production of a man's land, and the fruit of his trees, belong to him from the first moment of their existence. So, the young of an animal, and the child of a slave, belong to him who owns the animal or slave at the time of the birth; for, until then, the fetus is part of the mother. By *accessio*, also, a riparian proprietor acquires all accumulations formed by alluvial deposit.

Q. Define *alluvio*.

§ 20. A. The addition imperceptibly made to the bank: the quantity added at every instant being inappreciable.

Q. Suppose a distinct mass of ground carried away by flood, would that be acquired by the proprietor of the land on which it happened to settle?

§ 21. A. No: in *alluvio* the origin of the particles which have been imperceptibly collected must be undiscoverable; but here the land, never having been disintegrated, is the same, and remains in the same proprietor. If the ground so removed in bulk carried along with it trees, the roots of which afterwards extended into the neighbouring land, such trees (2) became the property of the owner of that land; for it is a principle that a tree belongs to the soil by which its roots are nourished (§ 31).

Q. When an island rises in the sea, who is proprietor?

§ 22. A. The first occupier: until occupation, no one, it is a *res communis*.

Q. Suppose the island rises in a river?

§ 22. A. It is an addition to the land of the nearest riparian proprietors: so that each of them is entitled to a share, proportional to the extent and proximity of his land along the bank.

Q. But suppose the river divided at a point, and united lower down, so as to transform a man's land into an island—what then?

§ 22. A. The property in land so transformed is unaltered. The sort of island, which vests in riparian proprietors, is one formed by the drying up of the channel, or the accumulation of sand.

(1) *Accessio* denotes not the fact of addition, but the *accessory*, or thing united to the principal—the *thing added*.

(2) Some read *acquisita*, which may be referred to the land.

Q. When a river changes its course, what of the two channels—the old, and the new?

§ 23. *A.* The nature of a river is such, that it alters the character of the ground, which is either covered by it or left dry: the former it makes *res publica*; the latter *res privata*. The new bed, therefore, becomes public; the old bed vests in the riparian proprietors, in precisely the same way as in the case of the island gradually formed in the river.

Q. Suppose the river to resume, after a time, its original channel, what of the new one?

§ 23. *A.* It vests in the riparian proprietors.

Q. Did land covered by a flood cease to belong to the same owner?

§ 24. *A.* No: a flood does not alter the character or the property of land which is covered for a season.

Q. Did the additions by *alluvio*,—the island in the river, the abandoned channel,—benefit all riparian owners without exception?

A. No: They benefited none whose lands were *limitati*, i. e., set out by metes and bounds (1). But they did benefit the riparian proprietors of those lands, called *agri arcifinales* or *occupatorii*, which were not confined within definite limits, but had the river as their natural boundary. For we may say that the river, by retiring, alters so far the boundary of the riparian properties.

Q. Explain *specificatio* and its effects on property.

§ 25. *A.* It is the act of transforming an original or raw material into something quite new (*novam speciem*), e. g., a block of marble into a statue, wool into manufactured stuff. When the specifier (2) worked on his own material, of course he was proprietor of the new article, e. g., of the statue cut from his own marble, and the vase cast from his own silver.

Q. But if he used the material of another, did the new

(1) *Agri limitati*, or *assignati*, were lands detached from the public domain, and converted into private property by a sale or grant, accompanied by peculiar rites and a formal setting out by metes and bounds. The owners of such land could claim nothing beyond the prescribed limits. Any addition made around or beyond them was therefore public, and would vest in the first occupier.

(2) *I. e.*, he who makes, or causes to be made; for the workman was not so much regarded as the person for whom he worked: *cujus nomine factum sit*.

article belong to the specificator, or to the proprietor of the raw material?

§ 25. *A.* On this subject there was a great difference of opinion (1). The Proculeians thought that the specificatio, by changing the form of the raw material, changed its nature and replaced it by something quite new. They therefore applied to the owner of the raw material the maxim, that you cannot claim back what has ceased to exist (*extinctæ res vindicari non possunt* (§ 26), and held that the new article belonged to the maker of it; viz. the specificator (2). But the Sabinians insisted that the material retained its original nature, and continued to subsist, notwithstanding the change of form: they therefore held that the material after being manufactured, the marble block after being wrought, the piece of metal after being cast, continued to belong to the owner of the raw material. In the end, however, a middle view was taken, which has been adopted by Justinian. According to it, if the material may resume its original state, it is considered not to have lost its nature, and still to exist, notwithstanding its change of form; hence, in accordance with the Sabinian view, the property in the new article belongs to the proprietor of the raw material (3). If, on the other hand, the thing may not resume its original condition (4), the product of the specificatio must be considered a new creation, which has never had an owner; and hence, in accordance with the Proculeian view, the property in the new article must be in the specificator.

Q. In the last case, is the specificatio to be considered as a peculiar mode of acquiring property?

A. No: it is only a sort of occupatio; the specificator

(1) All admitted the principle that the property in a thing, and the right to claim it back, continued so long as the thing existed. But it was in applying this principle, in order to determine whether the original thing continued to exist notwithstanding the *specificatio*, that opinions differed.

(2) Saving always an indemnity to the owner of the material.

(3) Thus, the vase made out of my silver or my brass belongs to me, because it may be made to resume the shape of a bar of silver or brass.

(4) If, for instance, wine has been made out of grapes, oil out of olives: Justinian adds *frumentum* from *spica*. This last would not be a good instance, if it referred to the mere act of threshing the corn; for all the grains exist in the ears of corn, and nothing new is formed by taking them out of the husks. But it would be different if the conversion of the grain into flour, by means of grinding, is meant.

becomes proprietor, because by his industry he has created and occupied something new (*quia quod factum est antea nullius fuerat*).

Q. What remedy had the proprietor of the material which was taken?

§ 26. A. Not *vindicatio*, the object of which is to establish a right of property; for you cannot prove yourself proprietor of that which no longer exists (*extincta res vindicari non possent*); but the proprietor of the material might sue the person who took it, 1st, by *actio furti* (action of theft), which is purely penal, and by which the thief is liable to a penalty of four times the value of the thing stolen, if he was taken in the act, and twice the value if he was not so taken (B. 4, t. 1); 2nd, by *condictio furtiva*, or the *actio ad exhibendum*, both *actiones civiles*, for the purpose of compelling the thief to restore the stolen article or to pay its value (1).

Q. Was the thief the only person whom the owner of the raw material might sue?

§ 26. A. No: he might have *condictio* against various other possessors (2), *e. g.*, the hæredes of the thief; possessors *malâ fide*, or even *bonâ fide*, if they had used the material, and so made away with the property of the owner thereof *post moram*, *i. e.*, after being summoned to give it up. But if the person sued was not a thief, some *condictio* (not *furtiva*) must be used (3).

(1) The term *condictio* was applicable to all personal actions in which the demandant insisted that the other party (*adversarius*) was bound to give, or to do something (*si paret dare, facere oportere*). There were several kinds of *condictiones*, of which the *condictio furtiva* was one. The *actio ad exhibendum* was brought to compel the production of an article which had been put away or destroyed *malâ fide*. If, on the day fixed by the *judex*, it was not produced, the defendant was condemned to indemnify the demandant against all damage caused by its non-production. Now, in a case of specification, as a thief could not possibly produce that which had been so transformed as to be incapable of being brought back to its original condition, he was condemned to pay the full damages. Lastly, since the *actio ad exhibendum* and the *condictio furtiva* had the same object, a plaintiff had to elect between them.

(2) We adopt the reading in the text (§ 26), *quibusdam aliis possessoribus*, and not *quibusque aliis*, which would mean against all other possessors.

(3) The *condictio sine causa*, or the general *condictio*, called *triticaria*, by which anything due, except cash, might be claimed.

Q. When the specifier, besides his labour, supplied part of the material, did the property in the new article always belong to him?

§ 26. A. Justinian seems to answer in the affirmative (*non dubitandum*); but as this is at variance with some passages in the Digest, and as the cases given by Justinian are all cases in which the material is not reducible to its original shape, it has been thought that, except in such cases, the new article would not become the absolute property of the specifier; so that where the raw material was reducible to its original condition, *e. g.*, a jar made of copper, partly the property of the specifier, and partly of another, the new article would be the joint property of both.

Q. If a man embroider a dress with the purple of another, to whom does the whole thing belong?

§ 26. A. To the owner of the dress, even though the purple be much more valuable than the dress itself; for anything, however valuable, used to ornament or to finish a thing, is deemed an accessory.

Q. What remedy had the owner of the purple?

§ 26. A. If the purple had been stolen, the owner thereof had the *actio furti* and the *condictio furtiva* against the thief, even though he was not the person who embroidered the dress with it. The owner had also *condictio* against other possessors, *e. g.*, against one who, though not himself the thief, had used the purple knowing it to be the property of another; or the owner, instead of *condictio*, might have an *actio ad exhibendum*.

Q. Did not the *actio ad exhibendum* sometimes enable a person to recover his property?

A. Yes. The purple, on becoming an *accessio* to the dress, ceased to be a distinct substance (1), and therefore it could not be recovered by its former owner. But the purple became recoverable by him the moment it ceased to be incorporated with the dress, and became a distinct substance. Now the *actio ad exhibendum* was intended to bring about this result, by compelling the defendant to separate the purple from the dress, in order to its being produced, or *exhibited*, or put in such a condition as to be the subject-matter of a *vindicatio* (2).

(1) It was not then purple, but a dress embroidered with purple.

(2) What is said of the purple applies to all other ornaments or finishing, as a diamond on the head of a sword, or a wheel put on

Q. When the materials belonging to two proprietors were mixed together (*confusæ*) by their consent, to whom did the mixed product belong?

§ 27. A. To the two jointly. Each of them was entitled to an action for partition, called *communi dividundo* (B. 4, t. 17).

Q. *Quid*, if the mixing was by accident, by the consent of one proprietor only?

§ 27. A. If the materials by being mixed lost their identity, *e. g.*, if wine and honey were mixed together, and so converted into *mulsum*, the new product was joint property, just as if the mixture had been by mutual consent. But if the materials, although mixed (1), retained their identity and separate character, *e. g.*, if the corn or cattle of one man were mixed with those of another, each proprietor retained the property in his own chattel; so that each grain, each head of cattle, still belonged to the same master.

Q. Suppose one of two proprietors kept possession of the whole heap of corn or the whole herd, what action would the other have?

§ 28. A. An *actio in rem* (for he continued proprietor), not indeed to recover back the identical grains, which it might be impossible to separate, but to obtain out of the mixed heap the quantity of wheat which properly belonged to him. And in such case it was the duty and within the jurisdiction of the *judex* to consider the quality of the grain, and to compel the owner of the inferior to allow more to the owner of the superior quality (2).

another's carriage. Paul says expressly, *quæcunque aliis juncta sive adjecta accessionis loco cedunt, ea quamdiu coherent dominus vindicare non potest: sed ad exhibendum agere potest ut separentur et tunc vindicentur*. Thus, in case of the junction of two things, the one not being produced by the other, the *accessio* does not give the proprietor of the principal thing property in the accessory, it merely creates a temporary obstacle to its being recovered (*vindicatio*).

(1) Strictly speaking, *confusio* is the mixing together of things liquid, or of things reduced to a liquid state, and *commixtio* the putting together of dry things, the particles of which do not amalgamate.

(2) The *actio in rem* of *vindicatio* is an *arbitrary actio*, *i. e.*, one which allows the judge to determine a mode of satisfaction to which the defendant must either agree or submit to heavier damages (*condemnatio*).

Q. Did a person who built on his own land with another man's materials become proprietor of them?

§ 29. *A.* The proprietor of the land acquired the house, for it was incident to the land (*solo cedit*); but it was the house as a house; for the materials, as materials, continued to be the property of their former owner, since the bringing them together did not annihilate them. It should seem, therefore, that the owner of the materials ought to have an *actio ad exhibendum*, like the owner of the purple; but the Twelve Tables, from views of public convenience, interfered to prevent the building being destroyed, so that the owner of the materials had neither an *actio ad exhibendum* nor in rem, so long as the building stood; he had, however, an *actio de tigno juncto* to recover back double the value of the materials; but if the building was destroyed, the owner of the materials (provided that he had not received the double value, for that would have transferred his property in them), had an *actio ad exhibendum*, or an *actio in rem* (1).

Q. Conversely, when a man built on another's land with his own materials, who was owner of the building?

§ 30. *A.* The landowner: it was an *accessio* to his land.

Q. What remedy had the owner of the materials?

§ 30. *A.* If it was a case of *mala fides*, i. e., if a man built upon land which he knew not to be his, he must be taken to have consented to the loss of his materials, and therefore, he had nothing to claim (2). If it was a case of *bona fides*, the builder, so long as he continued in possession, might set up in bar of any action brought by the landlord the *exceptio doli mali* (the plea of fraud), so that the builder escaped condemnatio, if the landlord refused to pay the value of the materials and workmanship (3). But after

(1) If a builder acted *mala fide*, he was liable both to an *actio furti*, and either to a *condictio furtiva* or an *actio ad exhibendum*; which last was brought, not because he was in possession of the materials, but because he had acted with such *mala fides* as no longer to have them in possession; and the builder, as he could not produce the materials, was condemned to indemnify their former owner.

(2) In strictness at least; but practically it was not so.

(3) This exception did not avail, unless the builder was in possession, and, therefore, defendant. If the builder was not in possession, he had probably no action, unless perhaps the *negotiorum gestorum* (B. 4, t. 13).

the building was destroyed, the *bonâ fide* builder might bring an action *ad exhibendum* and in rem for the former.

Q. Who owned trees planted or seeds sown in another man's land? (1).

§§ 31, 32. A. The landlord, provided they have taken root. Till then, the plant continued to belong to its original owner; but the moment it derived nourishment from the new soil, it became a new plant, which never reverted to its original owner, even though it was afterwards torn up.

Q. In deciding to which of two neighbouring proprietors a tree belonged, was regard had to the direction of the trunk?

A. No: the tree belonged to the owner of the land into which it had struck its roots; if they were in the lands of both, it belonged to both.

Q. If a man wrote upon another's paper, or painted on another's canvass, who was owner of the manuscript or the picture?

§ 33. A. The manuscript belonged to the owner of the paper, because the writing did not alter the material which contained it (2). For the same reason a picture should belong to the owner of the canvass; but Justinian settled this controverted point by holding that the picture belonged to the painter, because it was absurd to consider the work of an Apelles or a Parrhasius as a mere incident to a wretched piece of canvass.

Q. Was the artist entitled to bring an action in rem for the picture against the canvass-owner, who was in possession of it?

§ 34. A. Yes; but then the latter had the *exceptio doli* for the purposes of indemnity; nay, he had an *actio utilis in rem* against the artist, when he was in possession of the picture, and would not pay the value of the canvass (3).

(1) If the owner of the plant was in possession, he might be indemnified by the *exceptio doli*; or if he was not, by the *actio utilis in rem*, or by a personal *actio in factum*.

(2) The literary property is not the point here, but the property in the writing.

(3) *Actiones utiles* (as contradistinguished from *actiones directæ*) were not raised directly by the law, but, being founded on public convenience and equitable considerations, were framed in imitation of actions so raised, by means, for instance, of investing persons with qualities which they did not possess. Thus the canvass-owner has an action in rem, *i. e.*, claiming the *property* in the picture, as if he were in fact its proprietor; hence (*consequens est*) it was only an *actio utilis*.

Q. Did the property in fruits gathered vest in the bonâ fide possessor of land, as if he were the landlord?

§ 35. A. Such possessor had the same rights as the landlord in all fruits severed from the soil; over these he might exercise the full right of property. But he had not the absolute property in them as against the landlord, to whom he was bound to surrender whatever fruits were unconsumed; so that, in fact, he acquired none except those consumed before his mistake was discovered. As to a malâ fide possessor, the gathering of the fruit vested in him no kind of property, so that he had to account both for those consumed and those not gathered (B. 4, t. 17).

Q. What is a bonâ fide possessor?

§ 35. A. One who has received from another, erroneously believed by him to be proprietor, a piece of land by sale, gift, or other title importing, as between the parties, an intention to transfer the property (*justa causâ*).

Q. Besides the bonâ fide possessor, was there any other in whom the property in fruits gathered on another's land vested?

§ 36. A. Yes: the usufructuary and farmer (*colonus*), though neither proprietors nor possessors (for they did not claim to be so, p. 63), acquired the property in fruits gathered by themselves or in their name; but fruits fallen, or severed by a thief, unless taken and collected by the usufructuary or farmer, did not vest in them. Between the right of a usufructuary and that of a farmer there was this distinction (*eadem fere*): the right of usufruct died with the usufructuary; hence, fruits which were ripe, but ungathered at his death, did not vest in his *hæredes* by their gathering them; but the right of the farmer descended to his *hæredes*, so that they might gather and acquire the fruits in his stead.

Q. Does what you say of fruits apply to the productions and the young of animals?

§ 37. A. Yes; the property in such vested in the possessor or usufructuary, according to the same distinctions. But the child of a slave was different: it was not considered a fruit, for fruits are only those products of a Thing derived from using it for the particular purpose for which it is intended; now, as slaves are intended more for labourers than breeders of children, a slave's child is not acquired by the usufructuary, but by its mother's master.

Q. Define *traditio* (delivery).

A. It is the transfer of possession from one person to another.

Q. That delivery may transfer the property, what conditions are necessary ?

§ 40. A. He who delivers must have, 1st, the property ; and, 2nd, the capacity and intention to transfer it. He who receives must intend to acquire the property.

Q. If the one party intend to transfer, and the other to acquire the property, are the grounds of their intention important ?

A. No. Thus, if I choose to transfer property to you, because I consider myself bound by a will, whilst you consider yourself entitled by a *stipulatio*, you do, nevertheless, become proprietor.

Q. Does property in the thing sold and delivered vest in the purchaser immediately ?

§ 41. A. No : the vendor is considered not to intend to transfer the property, until he receives the price ; the price, therefore, must be paid before the property is transferred, unless the vendor is content with something else in satisfaction, *e. g.*, a pledge or security (*expromissor*), or unless he relies on the purchaser's good faith (*sequi fidem*), *i. e.*, intends to transfer the property without regard to the price, trusting to the purchaser for the payment thereof ; for here the intention is everything, and the property is vested at the moment of the delivery, whenever the vendor so intended.

Q. Does it signify whether delivery is made by the proprietor himself, or by another with his consent ?

§§ 42, 43. A. No. When a proprietor charges another with the full right (*libera*) of managing his business, and that other sells or delivers any of the things within the limits of his charge, the property is transferred.

Q. Was delivery a condition precedent to the transfer of property ?

§ 44. A. No : possession *plus* the proprietor's consent work the transfer ; delivery is only a means of giving possession. If the proposed transferee of property is already in possession, delivery is useless. Thus, if one who has let out or deposited a thing, sells it to the hirer or deposittee, these parties who thereby begin to possess (*animo domini*) as proprietors, acquire the property by the proprietor's bare will, without delivery (1).

(1) There is no need, therefore, of any fictitious delivery *brevi manu*, in which it is supposed that my tenant re-delivers the thing to me, and that I deliver it back to him. The delivery *brevi manu*

Q. When the property of a Thing was to be transferred, was it necessary that it should be placed in the hands of the intended transferee?

§ 45. A. No; for we are said to have *possession* whenever we have the absolute control. Thus, in order to transfer the possession and property of the goods in a warehouse, we have only to transfer the keys thereof, for whoever has the keys of a place has all the place contains (1).

Q. Could property be transferred to a person unascertained (*incertus*)?

§ 46. A. Yes, when such was the proprietor's intention; e. g., when prætors or consuls threw money to the people, their intention was to transfer the property to whoever picked it up, so that the property in the money vested in the first occupant thereof.

Q. Did not the property in a Thing abandoned likewise vest in the first occupant?

§ 47. A. Yes: Justinian held, that abandonment was like delivery to an *incertus*; but it is more accurate to say, that the property in a Thing abandoned vested in the first occupant, because it had no owner; for when a man throws a thing away he takes no heed what becomes of it, or who becomes owner thereof.

Q. When is a Thing abandoned?

§§ 47, 48. A. When the owner throws it away with the intention that it shall no longer be his. Without such intention, possession might be lost and the property retained. Thus, if a man in a storm threw his goods into

of the R. jurists was very different, for it was this:—Suppose I wish to transfer to Titius what you wish to transfer to me; I direct you to make the transfer to Titius direct. Now here, though there are two deliveries in substance, there is also one in fact. The texts also speak of delivery *longa manu*, as when a debtor, instead of paying his debt into my hands, put it down, by my direction, in my sight (*in conspectu meo*): here possession was acquired *longa manu*, for the ancients referred all the senses to touch. But this is not a *fictionis* delivery, for a thing may be said to be delivered to a man whenever he has it completely in his control.

(1) They were, in fact, only means to get at the contents of the warehouse; hence the delivery of them does not transfer the property, unless made near the door of the warehouse; and this shows that they are not the *symbol* of the corn, as has been said, for then the place of delivery would be unimportant.

the sea to lighten his ship, he retained the property, because he did not intend to part with it; and whoever finds such goods floating about, or cast on shore, and takes them in order to derive a benefit therefrom, is guilty of theft. So it is with things lost, *e. g.*, dropped from a vehicle without the owner's knowledge.

Q. Is it so also with things concealed in the ground, or in a building?

§ 39. A. Yes: but when all remembrance of the deposit is gone, and no one can prove himself owner, the thing concealed becomes *treasure*, and, as such, vests in the first occupant, according to the following distinctions:—If a man finds treasure in his own land, or by accident in a *locus sacer* or *religiosus*, the whole belongs to the finder; if a man finds treasure by accident in another's land, one half belongs to the finder, the other half to the landowner; lastly, if a man digs in another's land in order to find treasure, the whole belongs to the landowner.

Q. Having discussed how property is acquired by the *jus gentium*, explain how it is acquired by the *jus civile*.

Pr. A. 1, by *mancipatio*; 2, by *cessio in jure*; 3, by *traditio*; 4, by *usucapio*; 5, by *adjudicatio*; 6, *lege*.

Q. Explain *mancipatio*.

A. A solemn delivery, accompanied by solemn words and gestures, before a scalesman (*libripens*) and five witnesses, being Roman citizens. The price was represented by a piece of brass (*æs*). The purchaser laid hold of the thing to be sold, or some symbol thereof, saying, *Hunc ego hominem*—in case of a slave, *Ex jure quiritium meum esse aio isque mihi emptus est hoc ære æneaque libra*; he then touched the scales with the money, and handed it to the seller as the price. This mode was confined to things corporeal.

Q. Explain *cessio in jure*.

A. It was a feigned action in rem; that is, the purchaser *vindicabat*, or claimed the property of the thing in question in proper form (*hunc ego hominem ex jure quiritium meum esse aio*); the seller acknowledged, or did not dispute his claim, and the magistrate (at Rome, the prætor, in the provinces the *præses* or governor) adjudged the thing (*addicebat*) to the claimant (1).

(1) *Mancipatio* was more common, because it did not, like *cessio i. j.*, require the magistrate's presence; but as the former did not apply to *res incorporales* (except rural servitudes), the latter was sometimes indispensable (t. 3, 4, *post*).

Q. Explain *usucapio*.

A. It is a mode of acquiring property by holding possession for one year, in case of moveables, and for two years in case of immoveables (B. 2, t. 6).

Q. Explain *adjudicatio*.

A. Property was thus acquired when the *judex* in a suit brought for partition of an *hæreditas* (*familiæ eriscundæ*), or of a thing held jointly (*communi dividundo*), or to fix the boundaries of contiguous landowners (*finium regundorum*), settled the respective shares or boundaries; and each party acquired the legal estate or *civil* ownership in that which was adjudged to him by the *judex* (B. 4, t. 17).

Q. When was a man said to acquire the property *lege*?

A. In cases where the property was acquired by special provision of law. Thus, in case of legacies, the Twelve Tables said: *Ut legassit super pecunia tutelave suæ rei, ita jus esto* (1).

Q. Did *traditio* (delivery), regarded as a civil law mode of acquiring property, apply to all things (2)?

A. No, not even to all corporeal things, at least prior to Justinian; for on this point there was an important distinction between *res Mancipi* and *res nec Mancipi*.

Q. Explain it, and the place it occupied in the history of law.

A. The distinction is very ancient, and a passage in Gaius (B. 2, § 47) seems to prove that it existed even prior to the Twelve Tables, when the Roman law, like that of other barbarous nations, was overlaid with forms and symbols.—During the earliest period of Roman history, we find only one kind of property (*dominium ex jure quiritium*): a man must either have the civil law property or none at all. In general, this property could neither be transferred nor acquired by mere *delivery*: that could be done only by *mancipatio* or *cessio in jure*. There were, however, certain things of such trifling value, or in such general use, that the observance of these formal modes of transfer would have been impossible. Hence, no doubt, the distinction between things *Mancipi*, which required *mancipatio*, and the other formal modes of transfer; and things *nec Mancipi*, which were transferable by mere *delivery*.

(1) So, by the *lex papia poppæa* bequests to *cælibes* or *orbi lapsæ* (*caduca*), and vested in those *hæredes* or *legatees* who had children.

(2) Generally, none but corporeal things could be delivered or possessed. But a *quasi-possessio* was invented for things incorporeal.

According to Ulpian, *res Mancipi* included : 1. All hereditaments in Italy, either rural, as land, or urban, as a house ; 2. Servitudes attached to rural hereditaments, as rights of way, *aqueductus*, &c. ; 3. Slaves, and domestic animals used as beasts of draught or burden, *e.g.*, oxen, mules, horses, and asses. Every other thing (1) was *res nec Mancipi*, particularly hereditaments in the provinces, elephants, camels, and other wild beasts ; lastly, all servitudes, except rural ones in Italy.

Alienation, therefore, of a *res Mancipi* by delivery, without the legal forms, was null ; the alienor continued dominus *ex jure Quiritium*, and might recover the property by action in rem. The only remedy for this was *usucapio*, which vested the *Quiritarian* property in an alienee, who continued in possession for one year in case of moveables, or two years in case of immoveables.

Such was the law of the Twelve Tables, from which it appears : 1. That strangers (*peregrini*) had no property according to the civil law, since *Quiritarian* property belonged to citizens alone, or to *peregrini* who had obtained the *commercium*, for they alone could utter the form (*ex jure Quiritium meum esse aio*). 2. That even citizens were compelled to use these solemnities.

But this system of law, though it might satisfy the wants of early times, was found far too narrow and technical after

(1) It is to be observed (Ortolan, t. 2, p. 16) : 1. That the primitive Romans fixed the number of *res Mancipi*, and that this number was never increased ; for, after the conquest of Italy, the *jus gentium* began to prevail, and so *traditio* was substituted for *mancipatio* as the general mode of transfer. 2. The *res Mancipi* did not include things which might be consumed by being used ; for things of that sort were commonly in daily use, so that formal modes of transfer would have been practically impossible. 3. The *res Mancipi* were very distinguishable from each other ; for it was necessary that the witnesses at the *mancipatio* should easily recognize the thing *mancipated* : lastly, the *res Mancipi* were always valuable and useful ; for otherwise formal modes of transfer would have been unnecessary. Hence it is clear why *res Mancipi* did not include certain things : 1. Immoveables beyond Italy, though of great value ; for 1st, they arose after the number of *res Mancipi* was fixed, and 2ndly, provincial lands were regarded as the property of the emperor, or the public, the holder thereof having a mere right of enjoyment. 2. Camels, &c., although beasts of burden. 3. Gold and silver and precious stones, though of great value ; dogs, beasts, and wild animals domesticated, though very distinguishable, and not consumed by being used ; for all these were introduced after the number of *res Mancipi* was fixed.

Rome, by conquest and civilization, had increased her wealth, had multiplied her relations with foreigners, and had so enlarged her commerce as to necessitate a more rapid transfer of property. Then it was the prætors undertook to enlarge the circle of Roman law and to mitigate its harsher features—a task, moreover, which they accomplished without altering a letter of the text of the Twelve Tables.—Their plan was this: Suppose a thing *mancipi* transferred by bare delivery; if the seller, who of course continued *quiritarian* owner, brought an action in rem to recover it, the prætors granted an *exceptio* (1), which had the effect of repelling the claim; for though it was valid according to the civil law, still it was contrary to good faith. Nor did they stop here. Though the *exceptio* barred the action of a proprietor *ex jure quiritium*, it did not protect a purchaser against third parties, if he happened to lose possession of a res *mancipi* before having acquired title by *usucapio*. Now the prætor Publicius, who lived about Cicero's time, invented the actio *publiciana*, which gave a purchaser, out of possession, the same right to an action in rem as he would have had if the time requisite to acquire title *usucapio* had elapsed before his dispossession. Moreover, the prætors invented various *interdicta* (B. 4, t. 15) to protect a possession fairly obtained (*nec clam, nec vi, nec precario*).

Hence the position of one who had received a thing *mancipi*, by bare delivery, was no longer precarious, for he had a real right of property without the name. This property is denoted by the phrase *in bonis habere* (2). Theophilus and others call it *natural* or *bonitarian dominium*.

Thus, property was of two kinds, *quiritarian dominium* (*ex jure quiritium*) and *natural dominium* (*in bonis*); the former being part of the civil law, capable of being held only by Roman citizens, and of being acquired only by the

(1) *Exceptio rei venditæ et traditæ*, or the general *exceptio doli*. In this case the prætor, by the terms of the formula containing the question for the decision of the judex, directed him not to give judgment for the plaintiff (the *quiritarian* owner) *if he had made a sale or delivery, or if there had been mala fides on the plaintiff's part*. Now, as in the case supposed there had been both a delivery and *mala fides*, the defendant continued in possession.

(2) *In bonis esse*, to be amongst one's goods, *in fact*: *sum esse*, to be amongst them, *by right*.

modes admitted by the civil law; the latter being part of the *jus gentium*, capable of being held by *peregrini*, and of being acquired by bare delivery (1). When the *quiritarian* property in a thing belonged to one, and the *bonitarian* property therein to another, the former was said to have the *nudum jus quiritium*: for his rights were merely nominal.

Q. Was not this natural (*prætorian*) property found especially useful in the provinces?

A. Yes: not only were the inhabitants of the provinces (*peregrini*), who had not yet obtained the *commercium*, incapable of having the *quiritarian* property (2); but the peculiar character of the provincial lands prevented the tenants thereof, even though Romans, from having such property. For the provincial lands, unless they belonged to a city enjoying the privilege called *jus italicum*, were deemed the property of the Roman people (*stipendarii*), or the emperor (*tributarii*). In theory, therefore, the tenants could only have a right of enjoyment or possession. But as this possession was protected by the prætors, it became a natural property, capable of being transmitted by delivery, and by other modes allowed by the *jus gentium* (3).

Q. Did this state of things continue till Justinian's time? and what was his view of the subject?

A. In theory, the distinction between the *quiritarian*

(1) And by other modes allowed by the prætors, as *bonorum possessio*, *emptio bonorum*, &c.

(2) This incapacity ceased when Caracalla made all the ingenui citizens.

(3) The tenant, as against the state or the emperor, had only a bare *possession*—a bare occupation of no legal validity; but, as against third parties, this *possession* amounted to a recognised legal property. This species of property was provided for in the edict, and might be sold, given, or transferred by testament or descent, and that by means far more simple than those applicable to *quiritarian* property. It sometimes happened that the state's right of paramount ownership over the *ager publicus*, which, though occupied, still continued public property, was enforced against the tenants thereof. This dispossession of the tenants of the *ager publicus* was the result of the *agrarian* laws, which created so many tumults—not so much, however, because the rights of the state were doubted, as because it was thought hard that a tenant who had been in possession for years, and had spent much labour in improving his land, should be turned out without compensation.

and the natural (*in bonis*) property existed even in Justinian's time; but the natural property having been invested with all the beneficial incidents attached to quiritarian property, the distinction had become practically unimportant. Justinian, however, abolished it in terms; he also abolished the distinction between *res Mancipi* and *nec Mancipi*, and between *Italian* and *provincial* lands. In short, he laid it down that there should be only one kind of property, enjoying all the benefits created by the prætorian law, and capable of being transmitted by mere delivery, so long as the subject-matter was a *res corporalis* (1).

TITLE II.—OF THINGS CORPOREAL AND INCORPOREAL.

Q. Define things corporeal.

§ 1. A. Things recognised by the senses, *quæ tangi possunt*, because the ancients reduced all the senses to touch.

Q. Define things incorporeal.

§ 2. A. Things having nothing physical about them, consisting in right (*in jure consistunt*), as a right of succession (*hereditas*), of usufruct, of use, or an obligation. These rights are always incorporeal, though they may be, and generally are, derived out of corporeal things.

Q. It appears (p. 62) that *dominium*, or ownership, besides being recoverable by *vindicatio*, includes, 1. The right to use, *usus*; 2. The right of enjoyment, *fructus*; 3. The right to dispose of a thing, *abusus*; now, could these be separated from each other?

(1) Hence *mancipatio* and *cessio in jure* (except in case of certain servitudes) disappeared (t. 3). As to *usucapio*, it would have disappeared also, if its sole purpose had been to vest the property in one to whom a *res Mancipi* had been transferred from the owner thereof by bare delivery; but it had a further purpose, for it sometimes vested the property of a thing transferred by delivery from one *not being the owner*. In such case, bare delivery was not enough, even by the *jus gentium*, to transfer the property of another; whereas the civil law, in certain cases, did attach the property to possession continued for a fixed time. So far, therefore, *usucapio* did not depend on the distinction of things into *Mancipi* and *nec Mancipi*, and so far the doctrine of *usucapio* survived that distinction (t. 6).

A. Yes: the right to the use and to the enjoyment of the fruits might, either together or separately, belong for the time to a party not the proprietor. In such case the thing from which such party is to derive the advantage or service is said to be subject to a *servitus (res servit)*, which is called personal, because it belongs directly to an individual.

Q. Were there any other special rights capable of being carved out of the right of absolute property?

A. Yes: thus, one piece of land might be subjected, for the benefit of another piece of land, to certain services, e.g., a right of passage. Now, this right exists for the purpose of adding to the advantages derivable from the land, and therefore benefits the person only indirectly; it is a right attached to the land itself, and runs or is transmitted with it. This, then, is the *servitus* proper, and it is called *real*, as opposed to *personal*.

TITLE III.—OF SERVITUDES IN RURAL AND URBAN LANDS (PRÆDIA).

Q. How are real servitudes divided?

t. 2, § 3. A. Into *servitutes rusticorum* and *servitutes urbanorum prædiorum*, or rural and urban servitudes.

Q. What is meant here (1) by *prædia rustica et urbana*?

§ 1. A. Here *prædium rusticum* means the soil; *prædium urbanum* any structure whatever. Rural servitudes, therefore, are all those connected with the soil (*in solo consistunt*): urban, all those having a necessary connection with buildings (*ædificiis in hærent*).

Q. Mention the chief rural servitudes.

Pr. A. The servitudes of passage, of aqueduct (2). The right of drawing water (*aquæ haustus*); of watering or depasturing with cattle; of burning lime; of taking sand from a field.

(1) "Here," i. e., as regards servitudes, for generally *prædium rusticum* includes not merely the soil, but also the buildings erected for the purpose of profitably working it: so, *prædia urbana* include not merely buildings in a town, but also the court-yards and gardens attached to them.

(2) Provided the water is to flow over another's land; for if it was to flow over his building, it would be an urban servitus.

Q. Explain the servitudes of passage.

Pr. A. There were three: *iter*, *actus*, and *via*.

Iter was the right to pass on foot, on horseback, or in a litter (*jus eundi*).

Actus was the right to drive a beast of burden or a vehicle (*jus agendi*). He who had *actus* had *iter*; at least, generally, for of course a man might have the right to pass with cattle, and not without them.

Via was the right to use a way for any purpose, *e. g.*, to pass along either alone or with cattle, or with a vehicle. *Via* was made up of *iter* and *actus*. It differed from *actus* not only as to the breadth of the road (1): but also, first, because whilst in *actus* the right to drive a vehicle did not involve the right to drive beasts of burden, *via* necessarily included both these rights; second, because *iter* was not always included in *actus*, and because, even when included, it did not constitute an essential part of the servitude; whereas *iter* was always included in *via*, and did constitute an essential part of the servitude.

Q. Mention the chief urban servitudes.

§ 1. A. They concerned the right of one man to have his building supported by that of his neighbour (*oneris fundi*); the right to rest a beam for support (*tigni immittendi*); the right to raise or not to raise a building to a certain height (*altius aut non altius tollendi*); to receive or not to receive the rain-drops from a roof (*stillicidii vel fluminis recipiendi vel non recipiendi*) (2).

Q. How can the right to receive, and the right not to receive the rain-droppings, both constitute a servitude?

A. The essence of a servitude consists in there being an exception to the ordinary rights of property. Now it is obvious that land may be subject to a servitude by being compelled to receive the rain-droppings off a neighbour's roof. This, then, is the servitus *stillicidii recipiendi*. But, further, it appears that there were certain local statutes or customs by which persons were bound to receive the rain-droppings off their neighbour's houses; now, if a person acquired the right of not receiving the rain-droppings from such neighbour's houses, his land was subject to the servitus *stillicidii non recipiendi*. Again, if certain local statutes ordained that persons should not build beyond a certain height, that

(1) The common width of *via* was fixed by the Twelve Tables: it was eight feet, and at the turns (*ubi flexum*) sixteen.

(2) *Stillic.*, rain in drops. *Flumen*, rain collected.

land would be subject to a servitude *altius non tollendi*, whereon persons might not build up to the statutable height; and land would be subject to a *servitus altius tollendi*, whereon persons might build beyond the statutable height. The *servitus stillicidii recipiendi* and *altius tollendi*, however, are very uncommon.

Q. Does a servitude ever bind a man to *do* anything?

A. No. A servitude can only bind him to allow a thing to be done, or to abstain from doing it; for servitudes are simply fractions of the dominium, severed from it. Now, dominium never bound a man to do any positive act (1).

Q. Was there any exception to this?

A. Yes, one: in the servitude *oneris ferendi*. This servitude bound the proprietor of the servient tenement (2) so to keep his pillar or wall as to be capable of sustaining the neighbour's buildings which rest upon it, *i. e.*, the proprietor had to do all the necessary repairs: whereas the general rule of law was, that the proprietor of the dominant tenement is bound to do everything necessary for the exercise of his right.

Q. Why are real servitudes called *jura prædiorum*?

§ 3. A. Because two *prædia*, a dominant and a servient, are essential to the existence of a servitude. A servitude (proper) can only be constituted over one *prædium* (3) (the servient), for the more convenient use of another *prædium* (the dominant). The right, granted by me to a neighbour, to walk in my garden, or to gather the fruit there, and others like it, may constitute a *personal* servitude, like those of *usus* or *usufruct*, but not a servitude proper, *i. e.*, *in re*.

Q. Did a prædial servitude require the dominant and servient prædium to be contiguous?

A. They must be in the vicinity, *i. e.*, near enough to allow of the servitude being exercised. But *contiguity* is not essential, though in some servitudes, as the *jus stillicidii*, the *jus tigni immittendi*, it is required. In short,

(1) But one man may contract with his neighbour to do something; *e. g.*, to cultivate his garden; this, however, is a personal obligation, not a servitude attached to the land and transferable with it.

(2) A *servient* tenement is that upon which, a *dominant* tenement is that in favour of which, a *servitus* is imposed.

(3) That is an *immoveable*. Moveables, not being fixtures, cannot play the part either of a dominant or servient tenement (*prædium*).

the only essential condition is, that the *servitus* shall be capable of being exercised in fact.

Q. How were *servitutes* created or acquired ?

A. It may be said generally that, by the old law, *servitutes*, like the *quiritarian* ownership, were acquired by *Mancipatio*, *Cessio in jure*, *Adjudicatio*, *Lege* (including legacies, p. 76).

Mancipatio, however, was applicable to *rural servitutes* only; for they only were *res Mancipi*. *Urban servitutes* could not be created *inter vivos*, except by *cessio in jure* (1) —*usucapio*, at least after the *Lex Scribonia* (A.D. 37 ?) did not apply to any *servitus*. Lastly, we may observe, that it was competent for a party, in transferring a thing by *cessio in jure* or *mancipatio*, to reserve to himself the usufruct, or a *prædial servitude*, and thereby to create a usufruct or *servitus* (*usumfructum, servitutem deducere detrahere, excipere*).—No *servitus*—not even in things *nec Mancipi*—could be created by *Traditio*, because *servitutes* were incorporeal, and therefore could not be the subject-matter either of actual *delivery* or of *possession*.

Such was the law as to lands situate in Italy. To lands in the provinces *mancipatio* and *cessio in jure* were totally inapplicable; for a private person could not have the property (*dominium*) or any fraction of the property, such as a *servitus*, therein: he could only have a right of enjoyment. It was therefore necessary to have recourse to *pacta* and *stipulationes*, i. e., the proprietor who intended to subject his land to the render of a certain service to his neighbour, first agreed (*pactum*) as to the nature of the *servitus* to which he was willing to subject himself, and then bound himself by *stipulatio* (2) to do nothing to hinder the other party in the exercise of the right. This pact, and the stipulation, which served to secure its fulfilment, gave the neighbour no right in re, caused no actual disintegration of the *dominium*, but created a personal

(1) Nor usufruct, nor other personal *servitutes*; for none of them were *res Mancipi*.

(2) Observe the expression *pactis ET stipulationibus*. It will appear (B. 3, t. 15) that a bare agreement (*pactum*) did not raise any legal obligation: in order to this a *stipulatio* was necessary, i. e., when a question solemnly put by the obligor and answered by the obligee created the contract. In obligations there was the same sort of distinction between a *pactum* and a *stipulatio*, as in property between *delivery* and *mancipatio*.

obligation, raised the *actio ex stipulatu* (1) against the party bound, and thus secured to the party to whom he was bound benefits very similar to those attached to a *servitus* (proper).

Such was the strict law (the *jus civile*). But here, as in case of acquiring property, the prætors introduced certain practical changes founded on principles of equity. They held, that although a *servitus*, being a thing incorporeal, was incapable of being literally delivered and possessed, still, that the *exercise of the servitus* by one who was desirous of acquiring it, with the acquiescence of another who was desirous of creating it, should be equivalent to delivery. To this *quasi*-delivery, therefore, the prætors allowed the same sort of effect as they allowed in case of a delivery of corporeal property, i. e., they protected the *quasi*-possession, and the actual enjoyment of the *servitus*, first, by possessory interdicts, and afterwards by a fictitious *actio in rem*, called *actio publiciana* (p. 79). Again, when a transferor reserved to himself a right of usufruct or *servitus* out of a Thing at the time of transfer by bare delivery, the prætors allowed the same effect to such reservation, as they allowed under the old law, when a reservation was made out of a Thing on its being transferred by *mancipatio* or a *cessio in jure*.

Lastly, as to urban *servitudes*, which are characterised by a *continuous possession*, and some rural *servitudes*, as the right of passage and of *aquæductus*, the prætors set up a *præscriptio longi temporis*, by which means they secured the permanent enjoyment of the *servitude* to those who had already enjoyed it for a length of time (2) (t. 6, *post*).

(1) By means of this action a party, who did not fulfil his engagement, might be condemned to pay damages. The amount of them was often fixed by a supplementary stipulatio. Thus after, "Do you promise to be subject to such a *servitus*?—I do promise," the parties added: "And if you put any obstacle in my way, do you promise to pay one hundred *solidi* by way of a penalty?—I do promise."

(2) Urban *servitudes*, excepting those, of course, which consist in abstaining, e. g., the *jus altius non tollendi*, have certainly a *continuing* character not generally discernible in the rural *servitudes*. Thus, the beam resting on a neighbour's wall, the water-pipe hanging over his land, the window overlooking his court, are always there; but the right of passage, of drawing water, of depasturing, are used only for the time.

Q. What was the law, under Justinian, as to creating servitudes?

A. The changes introduced by the prætors were incorporated into the law. The prætorian and civil law had become one. Hence both *mancipatio* and *cessio in jure* had disappeared. Servitudes were created, 1. By agreements with quasi-delivery, or even without quasi-delivery, as when a proprietor on alienating a thing by delivery reserved out of it some servitude (1). 2. By testament (*lege*) (2). 3. By *prescriptio* or *usucapio* (3), in case of some servitudes. 4. By *adjudicatio* (4).

Q. Then agreements and stipulations, without quasi-delivery, cannot of themselves create servitudes?

A. No. Except where the servitude arises by the proprietor reserving it out of a thing on its alienation, no servitude can be created by agreement without delivery. Agreements and stipulations create a personal obligation only. And it is inconsistent with the very nature of obligations, which create a mere personal tie, that they should create absolute rights (*jura in re*), such as property and its fractional parts. Therefore delivery—not a mere agreement—is the only means by which the property can be acquired. These are fundamental principles of Roman law. Agreements (*pacta*) and stipulations may bind a party who enters into them, to grant or create a servitude, by permitting the exercise thereof: but the servitude does not exist as a right *in re* (a fraction of the dominium) until there has been quasi-delivery (5).

Q. How are servitudes extinguished?

A. 1. By the loss or destruction of the dominant or servient tenement; e. g., by the building being overturned,

(1) For delivery works a transfer of property, according to the will of the transferor, and within the limits fixed by such will. Thus, if a proprietor intends to transfer a fraction only of the *dominium*, a fraction only is transferred.

(2) Prior to Justinian, it was only the legacy *per vindicationem* which directly created a *servitus*; that *per damnationem* and *sinendi modo* merely bound the heres to create it.

(3) Under Justinian they became one.

(4) When in a suit for partition the *judex* encumbered the land of one with a servitude for the benefit of the land of another.

(5) This point is much disputed by French and German jurists; some holding that a mere agreement is sufficient to create servitudes, especially *negative* ones, i. e., those which consist in abstaining, as *altius non tollendi*—not building higher.

the land carried away or overwhelmed by the floods. 2. By confusio, when the same person becomes owner of both tenements (*prædia*). 3. By a release made by the owner of the dominant to the owner of the servient tenement (1). 4. By non-user (2) for a period, which Justinian fixed at ten years when the parties were present, and twenty when they were not (3).

TITLE IV.—OF THE USUSFRUCTUS.

Q. Define the usufruct.

Pr. A. It is the right of using (*usus*) and of enjoying (*fructus*) the Thing of another, without altering the substance thereof (4).

Q. Why do you say *Thing of another*?

§ 1. A. Because the *use* or *enjoyment* can be vested, as rights, only in those who are not themselves proprietors; for, in other cases, these rights would be merged in, or incidental to the property. Hence, *nemini res sua servit*, no one can have a servitude in his own property.

(1) By the old law it must be by *cessio in jure*; by the new law it might be done by a pactum.

(2) By not using at all, or not using it in the proper manner. Thus, if a person having the servitude to draw water, draws it at some place or time other than the place or time allowed, the servitude is lost after the lapse of the same time as would have sufficed to extinguish it in case no water had been drawn at all.

(3) In case of urban servitudes, the time began to run from the time when the owner of the servient tenement, in order to discharge his land (*libertatem usucapere*), did some act in violation of the servitude; e. g., raised his building higher, blocked up the windows, removed the rain-water pipes.

(4) *Salva rerum substantia*, some translate *so long as the substance remains*. This interpretation rests on the words which follow: for it is a right in a body (*corpus*), which being taken away, the right must also be taken away. This seems to show that the author is discussing, not the right attached to the usufruct, but its duration. But, 1. This interpretation makes the author lay down a truism. 2. It is not correct, for a usufruct was extinguished by the death of the usufructuary, whilst the substance remained. 3. Because the true meaning appears from Ulpian, who says that you cannot bequeath the usufruct, except of those things which may be enjoyed *salva substantia*, i. e., without being consumed. Hence we conclude that these words mean that a usufructuary has the *usus* and *fructus*, but not the *abusus* (p. 62).

Q. What do the rights of using (*usus*) and of enjoying (*fructus*) denote respectively?

§ 2. A. The *jus utendi* denotes the right to make use of a thing, and to extract from it whatever services it can render, without taking any of its products, and especially without altering the thing itself (*substantia*); e. g., using beasts to plough, or such like, living in a house, &c. The *jus fruendi* denotes the right to gather all the fruits of a thing. Hence the *usufructuarius* (who has the right of use and the right of enjoyment) has more than the *usuarius* (who has the right of use), but less than the proprietor, who has the *jus abutendi* besides.

Q. Of the different products of a thing, how do you determine which are fruits?

A. The purpose for which a thing is intended furnishes the means of determining which are fruits. Thus, the milk, wool, hair, and young of animals are fruits, because animals are kept for the purpose of producing such things. An usufructuary is entitled to all such products. But it is otherwise with the child of a slave (p. 73), and generally, with whatever is a mere accidental result of the Thing out of which the usufruct issues (1).

Q. How ought the usufructuary to exercise his right?

A. He ought to enjoy the Thing like a good pater-f.; i. e., he is, generally, bound to do whatsoever a proprietor, desirous of preserving his property, would do. Hence a usufructuary exceeded his right, if his enjoyment was such as to destroy the thing, for he has not the *jus abutendi*.

Q. Explain the rights and duties (obligations) of the usufructuary of a herd.

A. Being bound to preserve the thing out of which the usufruct issues, the usufructuary cannot derive any benefit from the young produced by the herd, except for the purpose of filling up (*ex fœtu*) the places of those beasts which have died or become aged (2). So an usufructuary's enjoyment of a garden is subject to the duty of replacing the dead trees by others.

(1) Thus alluvio, an island risen near land, a legacy to a slave, are not fruits.

(2) A single beast is not intended to live for ever. If, therefore, it dies without the fault of the usufructuary, he is not bound to replace it. But a herd is intended to live for ever, because herein we do not regard the individual, but the body (*universitas*); and the body remains the same, though the individuals change.

Q. Does a man, the moment he acquires the *jus fructu*, thereby acquire the fruits?

A. No. The usufruct confers the right to gather the fruits, and to acquire them by gathering or causing them to be gathered. But it is the gathering alone, *i. e.*, the taking possession thereof, which vests them in the proprietor: till then they belong to the landlord (1).

Q. How was a usufruct created?

§ 1. A. Under the old law it was created by testament, by *cessio in jure*, and by *adjudicatio* in suits for partition; but it could not be created by *mancipatio*, for it was not a *res Mancipi*; nor by bare delivery, for things incorporeal, like usufruct, could not be delivered; nor was there any method of creating a usufruct in provincial lands not having the *jus italicum*: to supply the place, however, of a usufruct *in re* in the provinces, recourse was had to agreements and stipulations; in other words, as it was impossible to create a usufruct (proper), the person who was willing to grant a usufruct in his land, entered into a contract with another to allow him *frui*, and to do nothing to hinder the gathering of the fruits, or the actual enjoyment. Moreover, the prætors amended the strictness of the old law, by holding that the exercise of the right of usufruct was a *quasi-possession*, and by protecting this *quasi-possession* by possessory interdicts, and the *actio publiciana in rem*. In later times, after land in the provinces had been put on the same footing with land in Italy, after the distinction between *res Mancipi* and *nec Mancipi* had ceased, and the modes of acquiring property allowed by the prætors were sanctioned by imperial law, a usufruct was created:—1. By testament. 2. By pacts, followed by quasi-delivery; or by reserving the usufruct of a thing when it was alienated by delivery. 3. By the adjudication of a *judex* in suits for partition (2). 4. Directly by the law, in certain cases (3).

(1) Page 73. If fruits were stolen before the usufructuary had gathered them, he had neither *actio in rem* (used when the thing stolen still existed), nor the *condictio furtiva* (used when it had been consumed); for both were confined to the proprietor, which the usufructuary was not: but he had *actio furti*, which was open to any one who had an interest in the thing stolen (p. 68).

(2) In such suits the *judex* might adjudge to one joint-heres or joint-owner the usufruct, to another the bare ownership in the same land.

(3) t. 9, *post*. The *pater-f.* had the usufruct in the *peculium adventitium* of the *filius-f.* by the Constitutions.

Q. Were there not various ways of creating a usufruct by testament?

§ 1. *A.* Yes. 1. You might bequeath the usufruct to one, the bare property (*proprietas*) remaining in the proprietor. 2. You might bequeath the land, reserving the usufruct (*deducto*), which thus vested in the *hæres*. 3. You might bequeath the usufruct to one, and the land *minus* the usufruct (*eo deducto*), to another.

Q. In the last case, is it necessary expressly to except the usufruct in a bequest of land, in order that the legatee of the usufruct may alone enjoy it?

A. Yes: for, otherwise, the right of enjoyment being naturally included in a bequest of land, the usufruct would vest in the legatee of the land by implication, and in the legatee of the usufruct by express words; so that each would have a concurrent right to enjoy in common.

Q. In what things may there be a usufruct?

§ 2. *A.* Unlike the case of servitudes (proper), there may be a usufruct not only in lands and buildings, but also in beasts, slaves, and other moveables. The only things in which there cannot be a usufruct are those which cannot be used without being consumed (*quæ ipso usu consumuntur*) (1), as wine, corn, cash, which are destroyed by the very using them.

Q. It was quite useless, therefore, to grant a usufruct in Things whereof the *usus* involved the *abusus* (consumption?)

§ 2. *A.* Certainly, under the old law. But a *Sc.*, supposed to have been passed in the reign of Augustus, ordained that the effect of granting the usufruct of things which perish in the using, should be to transfer the property therein (*ut ejus fiat*) to the usufructuary, if he undertook to restore, at the time when a usufruct (proper) (2) would

(1) They are called *res fungibiles*, and include (B. 3, t. 14), not everything which is actually consumed, but everything which the parties intend shall be replaced by things of the same species.—(B. 2, t. 4.) The text mentions *vestimenta* amongst *res fungibiles*. But there are texts in the Digest where it is said that a man may have a usufruct in garments. The truth is, that they became *res fungibiles* if the parties intended that the property in them should be transferred, the transferee undertaking to replace them by others of the same sort; but the mere use of them was transferred, if the parties intended that they should be restored in specie.

(2) *Viz.*, the death of the quasi-usufructuary or his *diminutio capitis*; for these are only the two modes of extinction which cau

have terminated, an equal quantity of similar things, or the sum at which they were valued.—By this law the senate did not declare that it was possible to create a usufruct in things *quæ ipso usu consumuntur*: that was an impossibility (*non enim poterat*); but it substituted for the usufruct an equivalent, viz., a quasi-usufruct.

Q. What kind of security did the Sc. require of the quasi-usufructuary, in order to insure restitution of the thing enjoyed?

A. It required a *satisfactio*, i. e., the promise (1) of the quasi-usufructuary himself, together with that of a *fidejussor*, or surety.

Q. Was the usufructuary (proper) bound to give any security?

A. Yes. The prætorian law required him to give security by *fidejussor*:—1. To enjoy like a *bonus pater-f.* 2. To restore, at the expiration of the usufruct, whatever remained of the thing enjoyed.

Q. How does a usufruct end?

§ 3. A. 1. By the death of the usufructuary, or by his *diminutio capitis*. 2. By non-user (*non utendo*). 3. By assignment to the person having the bare property (2). 4. By consolidation. 5. By changes in the substance of the Thing (3).

Q. Did the usufruct always cease on the death of the usufructuary?

A. As it was a right attached to the person of the grantee, it ceased of course with such person. There is no difficulty in applying this principle except where the usufruct is vested in the person of a *filius-f.* or a slave. Justinian, however, settled the matter by decreeing that after the death of the *filius-f.* or the slave, who held the usu-

by possibility apply to the usufruct of things, the using of which necessarily destroys them.

(1) By *stipulatio*, the *quasi-usufructuarius*, or his *heredes*, were bound to give back either articles of the same species as the things delivered, or the value thereof according to the terms of the *stipulatio*.

(2) *In jure cedendo*, said Gaius (2, § 30), Justinian *cedendo*, because in his time the *cessio in jure* had ceased. The assignment of a usufruct by mere agreement, which the prætors would have enforced indirectly by an *exceptio*, was enforced directly under the new law, where there were no exceptions.

(3) When the usufructus was granted for a time certain, or on a certain condition, it was extinguished by the lapse of the time, or by the happening of the condition.

fruct, it should survive for the benefit of the pater-f. or the master, during their lives.

Q. Does the usufruct cease by every *diminutio capitis*?

A. It did by the old law (1). But Justinian confined this result to *maxima* and *media d. c.*

Q. How does usufruct cease by non-user?

A. When the right has not been exercised for a certain time. Formerly this was one year, in case of moveables, two years in case of immoveables. Justinian made it three years in case of moveables, and in case of immoveables ten years, if the time ran against one who was present, and twenty years if it ran against one who was absent (*post*, tit. 6).

Q. May the usufructuary assign the usufruct to any but the proprietor?

§ 3. A. No: the assignment to a third party (*extraneo*) is void. So that the usufructuary retains his right notwithstanding his assignment (Gaius, 2, § 30).

Q. What do you mean when you say that the usufructuary cannot assign his right to a third party?

A. I mean, that he cannot transfer to the person of a third party the rights and character of a usufructuary so absolutely that it shall no longer be the death of the assignor, but that of the assignee, which is to put an end to the usufruct: for, if he could, he would have the power to alter at his pleasure the contingencies on which depends the union of the enjoyment with the property. The usufructuary, however, may enjoy in person or by others: therefore he may sell or let out the benefits incident to his right; and, if we look at the usufruct simply with reference to the *fruits* which it entitles us to gather, it may be said to be assignable (2).

(1) Thus, when a person *sui juris* was *adrogatus*, all his goods passed with him to the adrogator. But the rights of usufruct being exclusively attached to his person, could not be transmitted, and were therefore extinguished.

(2) The assignment which the usufructuary is here forbidden to make, is the *cessio in jure*. The reason for this depends on the nature of that process, which was a fictitious suit, in which the purchaser did not seem so much to be *acquiring* the right of another, as to be *recovering* a right of his own. Now, suppose this procedure used in order to assign a usufructuary's right to a third party, the usufruct, so assigned, would have to be considered as a right vested in the person of the assignee, instead of remaining vested in the person of the assignor, as it would have done had it been merely sold.

Q. What do you mean when you say that the usufruct is extinguished by changes affecting the substance of the Thing?

§ 3. A. I mean, that it is extinguished not only by being annihilated, but also by losing its characteristic form, so as to be incapable of fulfilling the purpose of its existence. Thus the usufruct of a house is extinguished by being pulled down: for the right continues neither in the soil nor in the materials. So the usufruct of a horse is extinguished by its death, and does not continue in the skin.

Q. Did the rebuilding of the house revive the usufruct?

A. No: herein a usufruct differed from a prædial servitude, which revived when the place to which it was attached was restored to its original condition.

Q. Define *consolidatio*.

A. It is the acquisition of the bare property by the usufructuary. It extinguished the usufruct *quia res sua nemini servit*.

Q. When a usufruct was vested in joint-usufructuaries, did the death of one of them diminish the rights of the survivors?

§ 4. A. No: the whole benefit of the usufruct survived with the property, until the whole usufruct was extinguished. But, for this purpose, the usufruct must be granted to several jointly, and not to each in separate shares.

TITLE V.—OF THE USE (USUS) AND HABITATIO.

Q. Define the *usus*.

§ 1. A. The bare use (*nudus usus*) is the right to make use of a thing belonging to another: but not to enjoy the fruits thereof (*sine fructu*).

Q. Does the *usus*, then, give no right to the fruits?

A. Not according to strict rule; and this is its essential difference from usufruct. Thus the party having the *jus utendi* is entitled to nothing in the progeny, the wool, or the milk of animals, whereof the *usus* has been bequeathed to him *quia ea in fructu sunt* (§ 4). He can only use them to manure his land (*ad stercorandum agrum*). This is expressly laid down (§ 4). But as the bare use often entitles a man to almost nothing, a certain latitude of interpretation is allowed in order to carry out the presumed intentions of the grantor of the use. Thus the

grantor of the use of a flock of sheep is allowed a little milk, because the presumption is that the testator intended to bequeath the bare uses, and something more.

Q. What right has the grantee of the use of lands?

§ 1. A. In strictness, he is entitled only to walk on the land, so that he does not hinder the cultivation thereof, or the gathering of the crops; but he can claim none of the fruits, unless, by putting an interpretation on the intentions of the grantor of the use favourable to the grantee, he be allowed to claim the wood, hay, and fruits required from day to day. But it must be carefully observed, that this is not the effect of the *jus utendi*, but a sort of appendix to it, arising from a presumption as to the bountiful intentions of the testator; a presumption, however, which can hardly be made if the grant of the use is *inter vivos*, because agreements are less open to interpretation than wills.

Q. Can the person having the use assign the exercise of his right?

§ 2. A. No: thus, he cannot let the house of which he has the use (1); he can only inhabit it himself with his family (2). So he cannot let out or lend a slave or a beast of burden, for he is not entitled to employ them except on works in which he is personally concerned (§ 3).

Q. How is a use created and extinguished? In what things may a man have a *usus*?

Pr. A. A use is created and extinguished like a *usufruct*, and in whatsoever things he may have the one, he may also have the other. Nevertheless, an use can be created neither by *adjudicatio*, nor directly *lege*. For though in actions for partition the *judex* has power to confer the *usufruct* on one and the land on another, there is no authority for saying that they have power to deal with the *use* in the same way; nor do we know of any case where the law directly confers on a man the use of a thing belonging to another.

Q. Define *habitatio*.

§ 5. A. The nature of this personal servitude is not obvious. Some jurists confound it with the *right to use* a house; but Justinian declares it to be quite distinct both

(1) In strictness, at least, for he may sometimes let a room in a house whereof he inhabits only part, because this benefits him and injures no one; for he who has the use may claim the whole use of the thing, and not merely as much as will supply his wants.

(2) (§ 2). But hardly with a guest.

from the *jus utendi* and the *jus fruendi*. For whilst the *jus utendi* is one and entire, the *habitatio* is a series of rights arising from day to day, so that in bequeathing it you make a separate bequest, in fact, for each day: hence, also, it was not extinguished by non-user. Justinian added the further distinction, that it might be let.

TITLE VI.—OF USUCAPIO AND POSSESSIONES LONGI TEMPORIS.

Q. Define *usucapio*.

A. It is a method of acquiring property, according to the civil law, by holding possession for a certain period (*usu capere*).

Q. Explain the object and consequences of *usucapio*, prior to Justinian's time.

A. Its object was twofold: 1. To vest the *quiritarian* ownership in one who, having obtained a *res mancipi* by delivery, held it only *in bonis*. 2. To vest the property of a Thing in the person to whom it had been delivered by another, not being the real proprietor, and without his consent. Under the civil law, after one year in case of moveables, and two years in case of immoveables, the property vested in the *bonâ fide* possessor.

Q. Did *usucapio*, then, apply to all goods?

Pr. A. To moveables everywhere; to immoveables situate in Italy: for the paramount ownership of provincial lands being in the Roman people or the emperor, private individuals could not have in them any real right of property. But the prætors protected the *bonâ fide* possessors of immoveables in the provinces; so that, after ten years' possession, in case the possessor and proprietor lived in the same province, or twenty years in case they lived in different provinces, the magistrate allowed such possessors a *præscriptio longi temporis*; i. e., an exception to repel both the *actio in rem* of the proprietor, and the action of any person claiming a right of *servitus*, or *hypotheca*, or any other right in *re* (1). In this last respect the *præscriptio longi temporis* was to be preferred to *usucapio*,

(1) The *præscriptio*, therefore, did not, like *usucapio*, cause the ownership, i. e., the *dominium civile*, to vest; it simply kept the thing *in bonis* of the possessor by barring the action in *rem* of the

which transferred, indeed, the property, but transferred it in the same plight, as when in the hands of the original proprietor; *i. e.*, with all its incumbrances; and in this respect there might be an advantage in *præscriptio* even when applied to lands in Italy.

Q. What changes did Justinian introduce?

Pr. A. Justinian having abolished all distinction between immoveables in Italy and in the provinces, between the quiritarian and prætorian (*in bonis*) ownership, *usucapio* could have only one of the effects attributed to it; *i. e.*, it vested the property in things delivered *a non domino*. *Usucapio*, however, regarded even in this light, underwent important changes; for the Emperor so amalgamated the rules and effects peculiar to the old *usucapio* with those peculiar to the *præscriptio longi temporis*, that at last there came to be only one mode of acquiring property by continuing in possession, which was denoted by the term *usucapio* or by the term *præscriptio longi temporis*,

proprietor, provided the possession was of a character to satisfy the conditions as to time, &c. But besides a *præscriptio* to bar any action of the proprietor, or of creditors secured by hypotheca, the possessor *longi temporis* had, if evicted, an *actio utilis in rem*; and against third parties he had the *actio publiciana*, even before the period had elapsed for obtaining the *præscriptio* against the proprietor. As to the meaning of the word *præscriptio*, it was originally synonymous with *exceptio*. *Præscriptio* (*præscribere*) was a statement at the head of the formula directed to the *judex* by the prætor, the object of which was to prevent the former from proceeding with the suit if the *præscriptio* was proved. When a proprietor claimed a thing from one who had been in possession for ten or twenty years, the formula sent to the *judex* began thus:—"Ea res agatur, cujus non est longi temporis possessio." Hence, if it appeared that the defendant had been in possession for the *longum tempus*, the case was closed; for the *judex* was directed to examine the claim only in case there had been no such possession. Thus, between *præscriptio* and *exceptio* there was this difference: *præscriptio* put an end to the case at once, if the facts upon which it rested were true; *exceptio* made it requisite to go into the whole matter, in order to see whether there had been fraud, violence, a release, &c. (p. 79). The one stood at the head, the other in the body of the formula. In later times, *præscriptiones* became a species of exceptions, and in Gaius's time, when pleaded by the defendant, they were always stated as exceptions. Finally, the two words were used synonymously, as in the 1st title to the 44th book of the Digest: *De præscriptionibus seu exceptionibus*.

and which required ten or twenty years' possession in case of immoveables, and three years in case of moveables (1).

Q. Did *usucapio* or *præscriptio* apply to things incorporeal?

A. It applied chiefly to things corporeal, for they alone could be physically possessed. Still, a man might discharge himself from servitudes, whether real or personal (2), and from *hypotheca* by *usucapio*, i. e., by holding possession of an immoveable, as if free from incumbrances for the fixed time: so a man might acquire by *præscriptio* certain rural servitudes and those urban servitudes, the very exercising of which was a sort of *continual* possession (p. 86): but a man could not by *usucapio* acquire the usufruct, or other personal servitudes (3).

Q. What are the conditions precedent to a man acquiring property by *usucapio* (*usucapere*)?

§§ 10, 11. A. 1. He must have possession (proper), i. e., *animo possidendi* (4). 2. Such possession must have been taken or received *bonâ fide*, and by a *rightful title*; or, at all events, under the reasonable belief that the property was thereby vested. 3. The possession must have lasted the proper time. 4. The thing possessed must be one whereof the property is capable of being acquired by *usucapio*, i. e., *res non vitiosa* (5).

Q. What do you mean by *rightful title*?

§ 10. A. *Iusta causa*, or *justus titulus*, denotes a contract or *factum*, which occasions the taking of the possession, i. e., *possessio animo domini*. Thus, a sale, a gift, the discharge, payment of a debt, the occupation of a

(1) The *usucapio* or new *præscriptio*, borrowed from the old *præscriptio* the ten or twenty years and its peculiar consequences, i. e., it extinguished the rights of creditors having *hypotheca*, as well as those of the former proprietor. It borrowed from the old *usucapio* its peculiar consequences, i. e., it caused the vesting of the civil property, the only property then in existence.

(2) Except *Habitatio*, pp. 92, 95.

(3) Before the *lex Scribonia*, a person might acquire servitudes by *usucapio*; and in the time of Gaius, persons acquired a *hereditas* in this way (B. 2, § 54). *Usucapio*, when regarded merely as a mode of acquiring, did not have the effect of relieving from an *obligatio*; nor did the prætors extend the method of *præscriptio longi temporis* to the extinguishing of *obligationes*.

(4) Thus, a person having only *nuda detentio*, or holding for another as a *locatarius*, or a deposit, cannot acquire by *usucapio*.

(5) Here *vitium* is any defect which renders a thing incapable of being acquired by *usucapio*.

thing abandoned or which never had an owner, or a legacy, are so many *justa causa*, lawful grounds or occasions on which the possession may be acquired. The person whose possession is founded on one of these contracts, or *facta*, or who holds possession, as it is said, *pro emptore, pro donato, pro dote, pro soluto, pro derelicto, pro suo, pro legato*, holds it by a *rightful title*.

Q. In order to acquire by *usucapio*, is it indispensable that the possession of the party acquiring should rest *justo titulo*, i. e., that there should exist one of those contracts, or sets of circumstances (*facta*) which are held to be a lawful ground of possession? Was the mistake of the party in possession, as to the existence of the *titulus* or *causa*, sufficient, in any case, to found a title by *usucapio*?

A. It is clear, that, generally, the *titulus* or *causa* which occasions the delivery, or the taking of possession, must exist in truth. The Institutes (§ 11) say expressly, that there is no *usucapio* when a party is mistaken as to the cause of his possession, as, e. g., when a man believes that he has bought, or received a thing as a gift, there having been in fact neither sale nor gift. So also it is laid down in a Constitution of Diocletian, that possession does not lead to *usucapio* without a *rightful title (nullo justo titulo procedente)*. Nevertheless, in the Digest, we find many exceptions to this rule.

Now the principle deduced by Ducaurroy and others, after much consideration, is this; that *bona fides* and *justus titulus* are not separate conditions, and that, wherever the title of the party in possession is discussed, it is discussed solely for the purpose of discovering whether his alleged *bona fides* and his mistake rest on fair grounds. Thus, why is it that there is no *usucapio* by a party who imagines that he has bought, or received a thing as a gift, which in fact he received as a deposit? Because his mistake regards a fact in which he is personally concerned, and is therefore unpardonable. So, on the other hand, why is it that a man may acquire title by *usucapio*, if he hold possession *bona fide*, by a sale or a gift which he believes to have been made to his slave or to his agent (*procurator*), or to the deceased, whom he has succeeded? Because his mistake regards a fact in which he took no personal share, and is therefore pardonable. So, if I did not know that the legacy had been revoked by which I assumed possession of its subject-matter, I might acquire title thereto by *usucapio*, though, in fact, there would be no *titulus* or *causa*; for a legacy revoked is no legacy. In

short, the only essential condition required is, that the alleged bona fides and the mistake of the person holding possession shall rest on reasonable grounds.

Q. Was a mistake in law a good foundation for a title by usucapio?

A. No: ignorance of the law was no excuse; because every one was presumed to know it (*juris ignorantiam in usucapione negatur prodesse, facti vero ignorantiam prodesse constat*). Thus, a man could not acquire title by usucapio of that which he received from a pupillus whose age he knew, but whom he supposed to be capable of alienating without any authority, or with an informal authority, from his tutor. But it would be different if he erroneously believed the pupillus to be of age.

Q. Is it necessary that the possession should be continuous? How is it interrupted?

A. The possession must be continuous during the whole of the required time. It may be interrupted, 1. *naturally*, when a man ceases to hold actual possession by himself or by others; 2. *civilly*, when an action in rem is brought against the possessor (1).

Q. What is the interruption of the usucapio called?

A. *Usurpatio*, from *usurpare*, which in law means to hold or keep by using, as *usucapere* means to acquire by using.

Q. Is it necessary that the party in possession should continue to act *bonâ fide*?

A. No: it is enough if he acted *bonâ fide* in taking possession.

(1) Prior to Justinian, the *præscriptio* was broken or interrupted, not by the summons, but by what was called the *litis contestatio*. For it was required that the *longum tempus* of the *præscriptio* should be completed when the prætor framed the formula for the judex; and if it was not then completed, the *præscriptio* did not prevent judgment (*condemnatio*) being given against the defendant. But *usucapio* was not interrupted by the action of the proprietor; for although the required time was not completed till the suit was progressing, the ownership was nevertheless acquired by the possessor. Nevertheless, as the judex had power to condemn the defendant to pay the value of the thing, if it appeared to have been the demandant's property when the prætor drew up the formula, he (the judex) was not prevented from condemning the defendant, because the property had been acquired by him after the prætor had drawn up the formula. The judex therefore condemned the defendant, unless he restored the thing in obedience to an order of which the judex gave him previous notice.—As to Postliminium, D. 49. 15. 12. 2.

Q. Is it necessary that one and the same person should hold possession during the whole of the prescribed time?

§§ 12, 13. *A.* No: as the *hæres* and the *possessor bonorum* continue the person of the deceased, they also continue his possession. Individual successors, like a purchaser, or donee, may add their possession to that of the person through whom they claim, in order to complete the time prescribed for usucapio. But it is to be observed that, in the first case, there is a *continuation* of the same possession, whilst, in the second, there is a *union* of two separate possessions: hence it follows, that the *bona* or *malâ fides* of the *hæres* is irrelevant; because it is at the time of taking possession that *bonâ fides* in the possessor is required, and the *hæres* has no possession in his own right. On the other hand, it follows that not only the purchaser or donee, but also the vendor or donor, must have been acting *bonâ fide* on their entry into possession, if it is intended that the two separate possessions shall be effectually united. Finally, although the vendor or the donor may have acted *malâ fide*, still the purchaser or the donee, who has acted *bonâ fide*, may himself originate a valid possession, which the *hæres* never could.

Q. Define *res vitiosæ*, i. e., things which cannot be acquired by usucapio.

§§ 1, 2. *A.* *Res vitiosæ* include: 1st. Everything not the subject-matter of commerce, and incapable of alienation, for *usucapio* is in fact a sort of tacit alienation. Thus, things *sacræ*, *religiøsæ*, or *publicæ*, freemen held as slaves, immoveables parcel of a marriage portion (*fundus dotalis*) (1), could neither be acquired by usucapio nor alienated (2). 2nd. Everything incapable of being acquired by usucapio, in consequence of some special enactment, e. g., things stolen, by reason of the law of the Twelve Tables, and the *Lex Atinia* (3), and things whereof possession had been

(1) The *fundus dotalis*, which was inalienable (t. 8), could not be acquired by usucapio. But if the usucapio had begun to operate before the marriage, it was not interrupted by any settlement (*constitutio dotis*).

(2) Probably the goods of *pupilli*, and of persons under twenty-five, should be included in this category.

(3) The *lex Atinia* was a plebiscitum, passed on the motion of the tribune Atinius Labeo, B. C. 197. It seems to have carried out the provision of the Twelve Tables, and to have laid it down distinctly, that things stolen should be capable of being acquired by usucapio, if they had first been restored to the proprietor's hands.

taken by violence, by reason of the laws *Plautia* and *Julia* (1). 3rd. Things belonging to the *fiscus* and to the emperor (§ 9).

Q. Can a fugitive slave be acquired by *usucapio*?

§ 1. A. No; because his flight is, in fact, a theft committed by himself of his own person.

Q. Does the prohibition against acquiring by *usucapio* the property in things taken by theft or violence apply exclusively to the thief and the raptor?

§ 3. A. No: as to them it is superfluous, for their *mala fides* is quite sufficient to prevent their acquiring by *usucapio*. The prohibition, therefore, goes further: it excludes from the benefit of *usucapio* all possessors, however *bonâ fide*, to whom the thing originally taken by theft or violence has been sold or delivered on perfectly *rightful consideration*.

Q. It would seem, therefore, that there are very few cases in which *usucapio* can apply to moveables.

§ 4. A. No doubt: but still there are some; e.g., if a *heres* sells a thing which has been deposited with or hired by the deceased, in the belief that it is his, the purchaser may acquire title by *usucapio*, for here there is no theft. So if the usufructuary of a slave, in the belief that the offspring is his, sells the slave's child, the purchaser may acquire title by *usucapio*, because there is no theft, for theft implies a fraudulent intent (§ 5).

Q. Why are immoveables more commonly the subject of *usucapio* than moveables?

§ 7. A. Because, it being admitted, against the opinion of some older jurists, that immoveables cannot be stolen, inasmuch as theft presumes removal or *subtractio*, the *bonâ fide* possessor may acquire title by *usucapio*, even though the seller or the donor may have acted *malâ fide*, provided only no violence was used in taking possession of the immoveable.

Q. Is the *vitium* or defect, arising from a thing being stolen or taken by violence, curable (2)?

(1) The *lex Plautia* is a plebiscitum proposed by the tribune M. Plautius, B. C. 59. The *lex Julia*, attributed to Augustus, is again referred to (B. 4, t. 18).

(2) Justinian requires, by Novella 119, c. 7, that the seller or donor should act *bonâ fide*, but if not, that the true owner should be cognizant of his right, and of the transfer of the possession to a third party. In other cases the possessor, notwithstanding his *bona fides*, would require thirty years to complete his title.

§ 8. *A.* Yes: it is cured by the real owner resuming possession of the *res vitiosa* as his own, and as having been stolen or forcibly taken from him; and if this *res* is afterwards delivered, neither by theft nor violence, to a *bonâ fide* possessor, he may acquire it by *usucapio*. It is different, however, if the original owner buys it back, not knowing that it has been stolen from him.

Q. Although *bona vacantia*, *i. e.*, goods of persons dying without successors, devolve on the public treasury, are there no cases in which they are acquired by *usucapio*?

§ 9. *A.* Yes: they may be so acquired until the agents employed to discover the treasury claims, report such goods to the government. So Papinian held, and his view is adopted in several *rescripts* of Antoninus Pius, Severus, and Antoninus.

Q. Is there any other *præscriptio*, besides that of ten or twenty years (*longi temporis*)?

A. Yes: the imperial Constitutions created a *præscriptio* of thirty or forty years, *i. e.*, *longissimi temporis*; which makes up by a prolonged possession for the want of some conditions required in the *præscriptio longi temporis*. After thirty years' possession, when the thing in question is *res vitiosa*, that is, when it has been taken from its owner by theft or violence, when the possession is not based on a *rightful title*, or* has not been obtained *bonâ fide*: after forty years' possession, when the thing in question consists of goods belonging to the state, to the church, or to pupilli, the possessor may set up the *præscriptio longissimi temporis* to an action brought by the proprietor, or by a creditor claiming under a *hypotheca*.—This *præscriptio*, though it protected the person in possession against all actions brought against him, did not invest him with the property (1); so that, if he lost possession, he had no action *in rem* against the new holder: that action was reserved for the proprietor alone. Justinian, however, afterwards attached to the *præscriptio longissimi temporis* the privilege of transferring the property whenever the possessor, at the beginning of his possession, had acted *bonâ fide*.

Q. Was there not a special *præscriptio*—a privilege introduced in favour of those who took from the *Fiscus*?

§ 14. *A.* Yes. By a Constitution of Marcus Aurelius,

(1) This, perhaps, is the reason why Justinian does not mention it in the Institutes, tit. *Usucapio*.

any, even a *malâ fide*, purchaser from the *Fiscus* of the property of another, might, after five years' possession, repel by a *præscriptio* the action *in rem* of the proprietor. Zeno decreed that every purchaser from the *Fiscus* should, from the moment of delivery, hold the property discharged of every *hypotheca*, reserving always a right to the proprietor and the creditors secured by *hypotheca*, to claim against the *Fiscus*, provided the claim was made within four years. Justinian extended this privilege to any purchaser from the palace (*domus*) of the emperor or of the empress.

TITLE VII.—OF GIFTS.

Q. Define a gift (*donatio*).

A. Strictly, and etymologically, it is the giving or transferring of property from motives of liberality (*dono datio*) (1). The original meaning of *donatio*, therefore, was not the promise or the obligation to give, but a gift executed. The promise, founded on the agreement to give, was not of itself binding; and, unless put into the shape of a *stipulatio*, he who had made a bare promise to give a thing, could not be compelled to deliver it, or to transfer the property therein to the donee. But the Christian emperors, particularly Justinian, attached to the bare agreement to give, a binding force, apart from the *stipulatio*; hence this agreement has acquired the same name as a gift executed, *viz. donatio* (2).

(1) *Dare*, in law, means to transfer the property. When this transfer is made in order to discharge a debt, it is *datio solvendi animo*; when in order to receive an equivalent, to create an obligation, it is *datio contrahendi animo*; lastly, when made *donandi animo* from mere liberality, it is a gift *dono datio*.

(2) Observe the changes in the law. Originally the law attached no weight whatever to any gift, unless perfected by delivery, or by some other mode of transferring the property; but if the promise to give was in the form of a *stipulatio*, there arose the obligation implied in every *stipulatio*, and the donee could compel the donor to deliver that which had been gratuitously promised. Lastly, the *stipulatio* became unnecessary, the mere consent of the donor and donee being sufficient to compel the one to deliver to the other what had been gratuitously promised; but still it was necessary, as we shall find, that the gift should be evidenced, sometimes by writing, sometimes by witnesses, sometimes by *insinuatio*, *i. e.*, by registration amongst the public records.

Q. Is *donatio* a special mode of acquiring the property?

§ 1. A. No; for in a *donatio* the property is transferred by delivery, by *mancipatio*, &c., as in any other case of alienation. Hence *donatio* is not a mode of acquiring, but only a particular cause of property being acquired, i. e., a gift is the cause of our acquiring by the ordinary methods any property transferred by a person acting with liberality towards us. There is, however, one kind of *donatio* which does, in fact, amount to a special mode of acquiring property, viz., *donatio mortis causæ*, which can only be executed at the donor's death; for on the donor dying, *donatio* transfers to the surviving donee the property in the thing given, without any delivery, and by mere operation of law. We may add, that after Constantine's time *donatio* may be considered a particular mode of acquiring property; for he decreed that delivery should not complete the *donatio* unless it was accompanied by certain forms calculated to secure the genuineness and publicity of gifts. Thus it was necessary that the consent of the parties should be proved by writing; and that the donor should divest himself of his property in presence of his neighbours and several witnesses. Moreover, gifts exceeding a certain sum had to be registered, under the penalty of being held invalid, i. e., the writing proving the act of liberality had to be registered with the proper officer.

Q. How many kinds of gifts were there?

Pr. A. Two: 1. the gift, *mortis causæ*; and 2, between living parties, *non mortis causæ*.

Q. Define the gift, or *donatio mortis causæ*.

§ 1. A. A gift, which is not to take effect until the death either of the donor or of a third party (1). The death on which the *donatio mortis causæ* may be made to depend, is either death generally, to which all are subject, e. g., I make a gift to you *if I die*, i. e., if I die before you; or death under certain circumstances, e. g., I make a gift to you, *if I die in such an encounter, on such a journey*.

Q. What is the peculiarity of the *donatio mortis causæ*?

§ 1. A. Its being revocable at the will of the donor

(1) Some hold this last to be a conditional gift *inter vivos*, and therefore not to be revocable at the will of the donor. In ordinary cases, certainly, the death of the donor is the condition upon which the *donatio mortis causæ* depends; hence the text says that, in it, the donor prefers himself to the donee, and prefers the donee to his *hæredes*.

(*si eum donationis pœnituisset*) : this is the real difference between it and any *donatio inter vivos*, even when made conditionally. Hence the *donatio mortis causâ*, being unexecuted until the death of the donor, the donee must at that period be capable of receiving, and the donor of giving; and if the donor survive the donee, the *donatio* is void.

Q. How many kinds of *donationes mortis causâ* are there ?

A. Two. 1. That which is dependent upon death, as a *conditio suspensiva*; i. e., a condition which suspends the vesting of the gift; e. g., *I give you this thing if I die on this expedition*. 2. That which is made on a condition *resolutoria*; i. e., a condition defeating the gift which has vested; e. g., *I give you this thing, but on the condition that you will give it me back if I return from such an expedition*. In the first case, the donee does not, until the death of the donor, acquire any right to the gift; but when the event specified happens, the thing given vests in the donee without any delivery, and by mere operation of law (1). In the second case, the *donatio* takes effect immediately, and the donee acquires the property at the moment of delivery; but when the event contemplated arrives, the *donatio* is defeated, and the donee is bound to restore what he received (2). This is the sort of gift which Telemachus made to Piræus, spoken of in the text.

Q. *Donationes mortis causâ* being revocable and unexecuted till the donor's death, look very like legacies.

§ 1. A. No doubt; but still there are differences, which make the *donatio mortis causâ* very like a *donatio inter vivos*. Hence it was a question whether the *donatio mortis causâ* partook more of the nature of a gift or of a legacy. Constantine seems to have thought it more analogous to a *donatio* (proper), for he required the same forms, particularly as to registration, to be observed as in the case of *donatio inter vivos*. Justinian decreed that a *donatio mortis causâ* should be assimilated to legacies in almost every respect (*per omnia fere*), and that such *donatio* should be valid without registration, whether reduced to

(1) The *donatio mortis causâ*, under a *conditio suspensiva*, is the *donatio mortis causâ* proper.

(2) Strictly, the delivery having transferred the property to the donee, the donor can only resume it by a new delivery, which the donee might be compelled to make by a personal action; but after a time the donor had an *actio utilis in rem*, as if, by the fact of surviving, he legally resumed the property in the thing given.

writing or not, provided it was made in presence of five witnesses.

Q. In what respect does a gift *mortis causâ* resemble a legacy, and in what respect does it differ therefrom?

A. It resembles a legacy: 1. Because, like a legacy, it is revocable, and is without effect if the donor survives the donee; 2. Because it may be made by any person who can bequeath, and to any person who can receive a legacy; 3. Because, like a legacy, it is satisfied out of the donor's assets, after deducting his liabilities, so that it lapses (*caducum*) by the insolvency of the donor; 4. Because the *hæres* may make the same reduction of the Falcidian fourth (B. 2, t. 22), from the one as from the other; 5. Because the *jus accrescendi* is applicable to both; 6. Because in both the property is transferred, on the testator's death, by mere operation of law. It differs from a legacy: 1. Because the donee is, by the gift *mortis causâ*, required to accept during the donor's life; 2. Because, not being dependent on the existence of a testament and on the *hæres institutus* (1) accepting the *hæreditas*, the gift *mortis causâ* takes effect by the mere fact of death before the *hæreditas* is accepted, and without regard to the fate of the donor's testament; 3. Because the capacity of the donee *mortis causâ* to take, must exist at the time of the donor's death, and not, as in the case of legacies, at the time when the disposition is made; 4. Because the gift *mortis causâ* sometimes transfers a defeasible property to the donee during the life of the donor, which never is the case in legacies.

Q. Define the *donatio inter vivos*.

§ 2. A. By this, the *donatio* (proper), a man irrevocably disposes of that which forms the subject-matter of his liberality. It is usually made *sine ulla mortis cogitatione*; but still, a gift, though made *in extremis*, may be a gift *inter vivos* and irrevocable, if the donor had no intention of ever taking it back, in other words, if death was rather the motive which induced the donor to give, than a condition either suspending or defeating the gift; for the essence of a gift *inter vivos* is its irrevocability.

Q. How was a *donatio inter vivos* made?

§ 2. A. From the time of Justinian it was made by the

(1) Observe, no man can die partly testate and partly intestate. No testament, or any disposition it contains, *e. g.*, a legacy, can be valid, unless one or more *hæredes* have been appointed to succeed the testator (*instituti*), and have accepted the succession (*adire hæreditatem*).

mere (verbal or written) consent of the parties: so that the mere agreement to give, sufficed to bind the donor to transfer the property, as in case of sale; for, observe, the property is never in fact transferred except by delivery. Justinian did not entirely abolish registration in case of gifts *inter vivos*; but, instead of requiring it for any gift exceeding 200 solidi, he required it only in case of gifts exceeding 500 solidi: moreover, the want of registration did not annul the gift; but in cases where that form was required, it merely reduced the gift to such amount as might pass without registration. Moreover, Justinian dispensed with the registration in some cases, *e. g.*, in gifts made for the redemption of captives, for rebuilding houses burnt down, &c.

Q. Is a gift *inter vivos* ever revocable?

§ 2. A. Yes, for ingratitude: as when the donee has been guilty of maltreating or seriously injuring the donor, when he has done any considerable damage to the donor's goods, or has failed to perform the conditions imposed upon him. In such cases, the right to revoke belongs exclusively to the donor, who can exercise it only during the life of the donee; nor does it descend to the donor's *hæredes*. Gifts are not revoked by the birth of a child, except in one case, *viz.*, where a childless patron has given his freedman the whole or a portion of his goods.

Q. Is there not one *donatio inter vivos*, which is always conditional, even though no condition is expressed?

§ 3. A. Yes: the *antenuptial donatio*, which is made to the wife before marriage, and in which the celebration of the nuptials is always an implied condition.

Q. What is the object of this *donatio*?

A. Its object is to vest in the wife, *ante nuptias*, certain goods as a security for her *dos*, *i. e.*, her marriage contribution. As the husband is bound to restore the *dos* on the dissolution of the marriage, so the wife is also bound to restore the goods constituting the antenuptial donation; and when the husband is allowed any benefit by survivorship out of the *dos*, the wife is allowed a proportionate benefit out of the *donatio* (1).

(1) Prior to Justinian, the proportion was relative, *i. e.*, if the husband retained a quarter of the *dos*, the wife retained a quarter of the *donatio*, whatever the value of the *dos* or of the *donatio*. But Justinian required that the equality should be absolute, *i. e.*, that husband and wife should stipulate for an *equal*, not a *proportional* share. The antenuptial donation was unknown in the old law (§ 3): it was only introduced by the emperors of Constantinian times (*a junioribus principibus*).

Q. At what time is this *donatio* to be made?

§ 3. *A.* As there can be no *donatio* by a husband to a wife, or vice versâ, a donor should make it before the marriage; and hence the name *donatio ante nuptias*. But Justin allowed such *donatio* to be increased during marriage, wherever the *dos* might be increased. Justinian went farther; for he decreed that just as the *dos* might not merely be increased but created during marriage, a *donatio nuptialis* might also be made after the celebration of nuptials. Hence he introduced the name *donatio propter nuptias*.

Q. Was there not, under the old law, one mode of acquiring property which was the indirect result of a gift?

§ 4. *A.* You mean, where a slave, the property of several owners, was enfranchised by one of them. Since a man could not be partly free and partly a slave, it was decreed that the non-enfranchising masters should be absolute owners by accrual (1), so that they might not be forced to surrender their property. But Justinian, thinking that nothing could be worse than to see a slave defrauded of his liberty, whilst his enfranchisement proved a loss to the more humane and a benefit to the more severe of his masters, abolished this *jus accrescendi*, and decreed that the slave should continue free, but that his non-enfranchising masters should receive a sum equal to their share in the slave, according to a scale fixed by the emperor.

TITLE VIII.—OF THOSE WHO CAN AND OF THOSE WHO CANNOT ALIENATE.

Q. Who have power to alienate?

Pr. A. That power belongs in general to the proprietor and to him alone. Still there are proprietors who cannot alienate, and there are persons who can alienate though they are not proprietors.

Q. Mention those persons who, although proprietors, cannot alienate.

§ 2. *Pr. A.* Amongst them Justinian mentions the husband, who cannot alienate the *prædium dotale*, and *pupilli*.

Q. What rights had the husband in the *prædium dotale*?

(1) Provided the enfranchisement would have rendered the slave a Roman citizen, if it had been effectual.

A. He was proprietor of the goods constituting the *dos*: but by the *lex Julia* he could not, without the wife's consent, alienate the *dotale prædium* in Italy, nor hypothecate it, even with her consent (1).

Justinian, by abolishing all distinction between Italy and the provinces, and between hypotheca and alienation, prohibited both, whether the wife did or did not consent, and wherever the land might be situate.

Q. What was the object of this prohibition?

Pr. A. Its sole object was to secure the restitution of the *prædium dotale* to the wife. Hence the alienation was null only as to the wife, and only in cases where she or her *heres*, on the dissolution of the marriage, was entitled to resume the *prædium*.

Q. How far is a *pupillus* incapable of alienating?

§ 2. A. He can alienate nothing without the authority of his tutor (p. 48).

Q. What should you say, then, in the case of a pupil who, without the tutor's authority, makes a loan called *mutuum* (B. 3, t. 14)?

§ 2. A. That there is neither *mutuum* nor the action raised by it; for there can be no *mutuum* unless the property is transferred to the borrower; and that the pupil cannot do: for he cannot alienate. Therefore he continues proprietor, and an action in rem is the only action he can have, so long as the thing lent exists in specie anywhere (*sicubi extant*).

Q. But as there can be no action in rem if the thing lent is gone, how is the pupil in that case to sue?

§ 2. A. If the thing lent has been consumed *bonâ fide*, the pupil has a *condictio*, i. e., a personal action, in order to compel the defendant to give him an amount equal to the sum lent (2). If the sum of money has been spent

(1) Hypotheca was not an alienation: it merely authorized the creditor, if his debt was not paid, to alienate the thing charged; but the very fact that the hypotheca did not, like alienation, divest the property, rendered women even less unwilling to give their consent; and this was a reason why the *lex Julia* was more severe against hypotheca than against alienation itself. The prohibition of the *lex Julia* applied only to *prædium dotale*. The moveables *dotalia* were always alienable.

(2) Here the *condictio* is raised, not by the *mutuum*, for there is none; but by the fact, that a delivery has been made with an intention which it has been found impossible to effectuate, i. e., the consideration has failed; *causâ data, causâ non secuta*.

malâ fide, the pupil has the action *ad exhibendum*, in which the defendant, finding it impossible, because of his own fraud, to produce the thing claimed, will be condemned to indemnify the pupil for the wrong occasioned by its non-production (1).

Q. What effect had the incapacity of a pupillus, in case he received payment of a debt from his debtor, but without his tutor's authority?

§ 2. A. The pupillus acquired the money, but the debtor was not discharged; for the pupillus, though he could not alienate, could acquire without the tutor's authority. Hence he acquired the money, for it was delivered to him with the intention of transferring the property; but he could not discharge his debtor, for that would have been to alienate one of his claims. The debtor, therefore, remained bound, and might still be sued for the money a second time; but if the pupillus retained the whole, or any of the money, or if, by judicious investment, the money turned out profitable to him, then the prætor allowed the debtor the *exceptio doli*, so as to bar the action of the pupillus to the extent of the profit derived.

Q. If the debtor paid with the tutor's authority, was he entirely exempt from liability?

§ 2. A. No: when payment had been made to the tutor, or with his authority, the debt was in fact extinguished, and the pupillus had only an action against his tutor; but if the tutor's insolvency rendered this action abortive, the prætor relieved the pupillus in like manner as he relieved all under twenty-five, who had suffered loss, *viz.*, by restoring them to their original position (*restitutio in integrum*). And thus the obligation, once extinguished, revived, and the debtor might be compelled to pay again.

Q. Did Justinian allow the debtor no possible means of protecting himself from liability?

§ 2. A. Yes: he afforded absolute protection to a debtor, if he paid with the tutor's authority, and with the permission of the judex. This permission was obtained without fee (*sine omni damno*). Nor was it required when the payment consisted of rents or of small sums.

Q. What is the effect of a pupil paying a debt, he being incapable to do so?

(1) In the *condictio* the defendant was liable to pay a sum equivalent to the sum received; in the *actio ad exhibendum*, he was liable to pay the damages, sustained by the plaintiff, who was himself entitled to fix the amount by his oath.

§ 2. *A.* The payment is invalid; for there can be no valid payment unless the property in the thing paid be transferred to the creditor, and so alienated. The pupil, therefore, retains the property, and may bring an action *in rem* to recover the thing transferred, but at the same time he continues bound by his obligation (1): if, however, the creditor has consumed the thing *bonâ fide*, the pupil is discharged, but at the same time deprived of his property.

Q. What persons, not being proprietors, may alienate?

§ 1. *A.* A creditor may alienate a thing pledged for a debt. Tutors and curators may in some cases alienate the goods of those under their *tutela* or *curatela*; but they cannot, as a general rule, alienate *prædia rustica* without the magistrate's sanction.

Q. Did a creditor's power to sell a pledge at all trench on the principle, that the proprietor alone can alienate?

§ 1. *A.* No: for such power was derived solely from the will of the debtor, by whose express or tacit consent it was that the creditor had the right to sell the pledge in case of non-payment. So essential is this right to the very existence of a contract of pledge, that any clause contravening it was held void: if there was such a clause, however, the sale was always preceded by three notices. The sale of pledges took place according to the forms settled by Justinian, unless the parties had themselves arranged the course of proceeding.

TITLE IX.—THROUGH WHOM ACQUISITIONS ARE MADE.

Q. Did a Roman ever acquire through anybody but himself?

Pr. A. Yes: he acquired not only through himself, but through those under his power (*filiif.* and slaves): through slaves in whom he had the usufruct; lastly,

(1) The pupillus continuing liable, it is not obvious what can be the benefit to him of the invalidity of the payment. For it may be said that the creditor, after restoring what he has received, may sue for a fresh payment. But it must be observed that the pupillus has often an interest in taking back what he has paid and continuing bound; as, for instance, when his obligation is either to be executed after a time certain, or is a mere contract of surety; for in the one case it is his interest to put off executing it till the proper period arrives; in the other it is his interest to enjoy the benefit of *discessio* and *divisio* (B. 3, t. 20).

through freemen and the slaves of others, being *bonâ fide* in his possession.

Q. What things did the pater-f. acquire through the filii-f.?

§ 1. A. Under the old law he acquired whatever was acquired by them. In each family there was only one patrimony, the property in which belonged to the pater-f. (*qui in domo dominium habet*); all the goods acquired by the filii-f. formed part of it (1). No doubt the pater-f. sometimes gave the filius-f. a portion of the patrimony as a *peculium*; but he had the mere management of such portion, and only so long as the pater-f. allowed him.

In course of time, the emperors allowed the filii-f. to have goods of their own, and thus arose the various *peculia*.

Q. Define *peculium*.

A. It is a portion of goods distinct from the common patrimony; particular goods, *bona peculiararia*.

Q. How many kinds of *peculia* are there?

A. Four. 1. *Peculium castrense*, comprising everything acquired by a filius-f. on account of military service. 2. *Peculium quasi castrense*, comprising all presents from the emperor or empress, and everything acquired in the exercise of civil or ecclesiastical duties. 3. *Peculium profectitium*, comprising everything derived by the filius-f. out of the property of the pater-f. (*ex re patris*). 4. *Peculium adventitium*, comprising everything coming to the filius-f., except from or through the pater-f. (*ex alia causâ*); and we may add, not acquired by him in military service, or in the exercise of public functions.

Q. What rights has a pater-f. over these *peculia*?

§ 1. A. The *peculium profectitium* is the only one in which the pater-f. acquires the absolute property according to the old rule. In the *adventitium* (2) he has merely the usufruct and management, the bare property being re-

(1) So Gaius says (2, § 96) that neither filii-familias nor slaves could acquire by the *cessio in jure*, because, being incapable of having anything of their own, they could not claim to recover the property.

(2) Justinian, by thus including all the *bona adventicia*, simply generalized the rule originally adopted by Constantine, as to goods coming to the filius-f. from his mother, and which that emperor's successors extended to all goods left to filii-f. by a maternal ancestor, by one of a married pair to the other, or by a betrothed man or woman to the other.

served to the filius-f.; so that when the pater-f. dies, the goods in it do not sink into the family property, to be divided amongst all the filii-f., but they continue in the filius-f. who has hitherto had the bare property. Of the *castrense* and *quasi-castrense*, the pater-f. has not even the enjoyment; they remain the absolute property of the filius-f. (*vide*, however, tit. 12, *post*).

Q. Did the right of the pater-f. over the *adventicium* cease on the emancipation of the filius-f.?

§ 2. A. Yes. This right being a mere consequence of the patria potestas, ceased with it. But the Constitutions allowed the emancipating pater-f. to retain a third of the *adventicia* (*quasi pro pretio quodammodo emancipationis*). Justinian, instead of a third in absolute property, allowed the usufruct of the half.

Q. What does the master acquire through his slave?

§ 3. A. As the slave can have nothing of his own, the master unconsciously, and in spite of himself, acquires whatsoever is acquired by the slave by any title whatever.

Q. Does the slave ever need his master's permission in order to acquire?

§ 3. A. Never, except to acquire an *hæreditas*; for, since the acceptance thereof exposes a man to the risk of being obliged to pay all the debts of the deceased, it was decreed that a slave, on being appointed *hæres* by a stranger, should not become *hæres* except by his master's command (1).

Q. When a slave belonged to several masters, who was entitled to acquisitions made by him?

A. The several masters were entitled, not, however, in equal shares, but in proportion to the rights of each in the slave.

Q. Is property the only right acquired through filii-f. and slaves?

(1) § 3. This was not required in order to the slave's accepting a *legacy*, because the legatee was not bound to pay the debts.—Our remarks as to the slave apply to the filius-f. under the old law; but after *peculia* were introduced, the consent both of the pater-f. and filius-f. was required, in order to the acquisition of a *peculium adventicium*, i. e., goods whereof the pater-f. has the usufruct and the filius-f. the bare property. Justinian decreed that the party refusing his consent, in such case should not share in the goods acquired, but that the consenting party should claim the whole profit, and be liable to the whole risk.

§ 3. *A.* No: for through them a man may acquire the benefit of obligations incurred by others to them (B. 3, t. 17, 18), as well as possession, and the benefits incident to it, *viz.*, *usucapio* and *præscriptio*.

Q. Does the master acquire the possession, as he does the property, unconsciously and against his will?

A. No. Possession involves two elements: 1. The physical hold of a thing; and, 2. The intention to possess. Now, although a man may possess *corpore alieno*, still, the intention is essentially a personal thing (*animo nostro*). A master, therefore, never possesses through his slave and against his own will—nay, as a general rule, he does not possess unconsciously. But where a master has intrusted his slave with the management of a portion of his goods as a *peculium* (which was not uncommon), then, to avoid the inconvenience of the master being obliged continually to interfere in the management, such master is held to be the unconscious possessor of whatever comes into his slave's possession as a result of the *peculium* intrusted to him.

Q. What things are acquired through a slave by one who has only the usufruct in the slave?

§ 4. *A.* Such things only as arise out of his industry (*ex operibus suis*), or out of the goods placed in his hands for the purpose of fructifying (*ex re fructuarii*). Things acquired through the slave from other sources, *e. g.*, from his appointment as *hæres*, from gifts or legacies made to the slave, benefit not the usufructuary of the slave, but his master, *i. e.*, the bare-proprietor (1).

Q. If a person had in his *bonâ fide* possession the slave

(1) For an *institutio hæredis* (appointment as *hæres*), a legacy and a gift are not *fructus*: the purpose of a slave, as such, not being to acquire successions or legacies. Nevertheless, any gift made to a slave, specifically for the usufructuary, would benefit the latter. Such gifts would be held to arise *ex re fructuarii*. So any gift made to a slave in consideration of work done by him for the donor, provided such work concerned the slave's profession, went to the usufructuary. He who has the *usus* (of a slave) can only employ him in his (the employer's) own business, and cannot make him work for others, and so derive a profit; hence he cannot derive any benefit by acquisitions arising out of the mere industry of the slave (*operibus*): he can claim no right except in those arising out of his own property, *e. g.*, out of the land which he gets cultivated, and the products of which he gets sold by the slave, or out of the business which is carried on by the slave.

of another, or a freeman, what things might such person acquire through that slave or that freeman?

§ 4. *A.* Whatsoever a usufructuary might acquire. All other acquisitions belonged to the man himself, if he was a freeman, and to his master, if he was a slave. Observe, however, that another man's slave might be acquired by *usucapio*, so that, after the prescribed time, every single thing acquired by the slave would belong to his *bonâ fide* possessor; whereas property in a freeman could not be acquired by *usucapio*, nor could a usufructuary ever acquire by *usucapio* a slave in whom he had the usufruct, for, first, the usufructuary has not the possession (proper), he merely holds for another, thereby admitting he has not the property; and, secondly, if he claimed the property he would be acting *malâ fide*, each of which is a sufficient reason to prevent *usucapio*.

Q. Did the usufructuary and the *bonâ fide* possessor acquire the possession as they did the property?

§ 4. *A.* Yes; and according to the same rules.

Q. Were the persons above mentioned the only ones through whom acquisitions might be made?

§ 5. *A.* Yes. They at least were the only persons who acquired for others the property, or the possession, which they acquired in their own name. What somebody else acquired in his own name could not become mine, except by a new transfer: and yet I might acquire possession through another (*per extraneam personam*), if he received a thing in my name, and by such possession I might become proprietor thereof (p. 74).

Q. Suppose another takes possession of a thing in my name, when does the possession vest in me?

§ 5. *A.* If he has done so at his own suggestion, the possession does not vest, until I am cognizant of and have ratified his act. But if a person has acted by my orders, and as my *procurator*, for instance, the possession vests without my knowledge; *i. e.*, without my knowing precisely the act by which my mandatory has executed his commission (1), though not without my willing it; for

(1) But here also the time for *prescriptio* and *usucapio* begin to run from the time when a man first becomes aware of his possession, because *usucapio* and *prescriptio* apply only to a *bonâ fide* possessor, *i. e.*, one who believes himself to be proprietor; but he who is in possession without knowing it, can have neither *bona* nor *mala fides*.

anything done in execution of a power granted by me, must be done by my will.

§ 6. *Note*.—Hitherto we have discussed the modes of acquiring particular things (*res singulares*). We ought now properly to proceed to *legacies* and *fidei commissa*, which may be called modes of acquiring by the law (*lege*). But, adhering to the text (§ 6), we shall postpone them to the twentieth and following titles, and proceed at once to the modes of acquiring *per universitatem*, i. e., the aggregate, the whole body of a person's rights and goods; in which aggregate every single thing must of course be included. The aggregate of a man's goods are included in, and therefore may be transmitted by the *hereditas*, the *possessio bonorum*, the *adjudicatio bonorum* (to sustain enfranchisement) (B. 3, t. 11), and by *adrogatio*. *Hereditas* and the *possessio bonorum*, both denote succession to all the claims and liabilities of a man deceased, the former being regulated by the civil law, the latter by the edicts of the prætors which modified that law. The *hereditas* was transferred either by testament, or directly by operation of law: *hereditas legitima* occurring only when there was no *hereditas testamentaria*. Hence the Institutes discuss the latter first. It only remains to notice a curious principle of Roman law, viz., that the *hereditas legitima*, and the *hereditas testamentaria* so absolutely excluded each other, especially under the old law, that no man could dispose by testament of part of a succession (*nemo pro parte testatus pro parte intestatus decedere potest*) (B. 2, t. 14), so that a valid testament of necessity disposed of the whole succession or estate, and therefore contained not merely particular legacies, but also the appointment of a successor (*institutio hæredis*).

TITLE X.—OF THE FORM OF TESTAMENTS.

Q. Define a testament.

A. It is the evidence, in legal form, of that which we wish to be done after our death. *Testamentum est voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri vult* (1).

Q. At Rome, what were the original forms of testaments?

(1) So says Modestinus, from which it appears that the intentions of the deceased, however clear, were ineffectual, unless legally expressed (*justa*). After the introduction of codicils (*post*, 25, tit.) the more accurate definition of a testament would be a solemn act of last will, appointing (*instituting*) a direct *hæres*, for the *institutio hæredis* is the very essence of a testament, and distinguishes it from a codicil, by which a *hereditas* can neither be given nor taken away, though *particular* things may.

§ 1. *A.* In the earliest times of Rome, testaments were made in the form of laws; and we find two sorts:—1. The testament *calatis comitiis*, which was made in an assembly of the *comitia curiata*, convoked twice a year for this purpose. 2. The testament *in procinctu*—a military testament—which was made just before an engagement, or before setting out on an expedition, in presence of the troops in marching and fighting order; for, *procinctus*, says Gaius, *est expeditus et armatus exercitus*. The people, or the army who represented it in war, on the motion of a citizen, sanctioned his selection of *hæredes*, and their appointment. To these two was added a third, the testament *per æs et libram*, which in principle was simply a *mancipatio* of the *hæreditas*, *i. e.*, a sale of it made according to the forms, with a reservation of the usufruct. The testator, in presence of six persons, being of full age and Roman citizens, of whom five acted as witnesses and one as scales-man (*libripens*), declared that he sold and transferred *familiam suam*, that is, his *hæreditas*—the aggregate of his rights—to the person whom he had selected as his *hæres*, and who, as purchaser (*familie emptor*), gave the seller, in token of the price, a piece of brass (*æs*), with which he had previously touched the scales (*libram*) (1).

These indirect modes of bequeathing clearly prove that citizens had not yet acquired the right to make a testament. In order to keep property in families, the will of one person was not allowed to interfere with the ordinary rules governing the descent of property: a law was necessary. And it is simply because there was no right to make a testament, that the indirect mode, *per æs et libram*, or solemn sale (*mancipatio*) was employed: in short, what could not be transferred to a *hæres institutus* was sold to a purchaser (2).

(1) The *hæreditas* was therefore a *res Mancipi*.

(2) This, however, was but an imperfect substitute for a regular testament. The *emptor familie* acquired, like any other purchaser by *mancipatio*, an indefeasible right over the *hæreditas*. Hence the inconvenience of the testament *per æs et libram*; for, 1st, it bound the testator irrevocably; 2nd, you could not appoint as *hæres* a child, or a deaf or dumb person, or one under *interdict*, because none of them could take part in the *mancipatio*. A pater-f. could not directly appoint as *hæres* his filius-f., for between them *contrahi emptio non potest*. Hence, in order to transmit a *hæreditas* to one filius-f. in preference to the others, it was necessary to sell it by *mancipatio* to a third party, a friend, who was charged with

The law of the Twelve Tables was the first which gave a man the right to make a testament; i. e., to appoint directly, and of his own will, a *hæres* or a legatee. The following are its terms: *uti legassit super pecunia tutelave suæ rei ita jus esto*.

Thenceforth, as might be expected, the testament *calatis comitiis* was disused. The testament in *procinctu*, which was only a corollary from the last, survived the law of the Twelve Tables: but it was modified (1). As to the testament, *per æs et libram*, though apparently retained, it underwent many changes.

Q. Explain these changes.

A. The forms of *mancipatio* remained. There were still the five witnesses the *libripens* and the *familia emptor*: but the last was no longer the actual purchaser or transferee of the *hæreditas*. His presence was merely formal, and in imitation of the old law (*propter veteris juris imitationem familia emptor adhibetur*, Gaius, 2, § 103).

In substance, therefore, the testator made a direct disposition of his estate in favour of the *hæredes* selected by him, and of his legatees. According to Gaius the proceedings were these. The testator first wrote or caused to be written the proposed dispositions upon tablets. Then came the solemn forms of *mancipatio*, in which, however, the formula recited by the *familia emptor* was changed; instead of saying, as in an actual *mancipatio*, *Hanc ego rem ex jure quiritium meam esse aio*, he said, *Familiam pecuniamque tuam endo mandatam tutelam custodelamque meam (recipio eaque) quo tu jure testamentum facere possis secundum legem publicam, hoc ære æneaque libra, esto mihi empti*. By these words *quo tu jure testamentum facere possis secundum legem publicam*, the *f.-emptor* clearly admitted that

the trust of surrendering it to the proper party (B. 2, t. 23). The *emptor familia* was certainly bound to execute some directions in the will, e. g., to give certain persons specific articles; for such directions were part of the conditions of sale. But the *emptor-f.* could not be charged to restore the whole *hæreditas*, except by its being charged upon him as a trust; for such a condition was repugnant to the nature of a sale.

(1) Cicero de nat. deor. 2, 3, speaks of this kind of testament as existing in his time, and Velleius Paterculus, 2, 5, alludes to it. But the testament in *procinctu* was not and could not be anything more than a solemn declaration of last will; for the army had no legislative power; the companions in arms of the soldier who made his will were mere witnesses (tit. 11, post).

the sale was a mere fiction, and that the testator retained the right allowed by the Twelve Tables to dispose of his goods as he pleased. Moreover, after the *emptor* had pronounced the formula, struck the balance, and given the brass to the testator, the latter said, showing the tablets, *Hæc ita, ut in Tabulis cerisque scripta sunt, ita do ita lego ita testor: itaque vos, quirites, testimonium mihi perhibetote* (1). The new testament *per æs et libram*, therefore, consisted of two parts, *mancipatio*, which was a mere fiction, and the solemn declaration of the testator, called *nuncupatio*; for, says Gaius, *nuncupare est palam nominare*, to name aloud. The testator, by his declaration, proclaimed and confirmed generally, the several dispositions made by him in the *tabulæ testamenti* (2).

Q. Was the testament *per æs et libram* thus modified long retained?

A. Yes: it survived to the time of Gaius and Ulpian; and it was retained as the testament of the civil law until the times of Theodosius II. and Valentinian III., who replaced it by the testamentum *tripartitum*, used in later times.

Q. Why do you say that the testament *per æs et libram* continued to be the testament of the civil law?

§ 2. A. Because, from a very remote period, besides the testament of the civil law, there was another of the prætorian law (3). The prætor, in fact, dispensing with the formal parts of *mancipatio* and *nuncupatio*, and converting the libripens and emptor *familiæ* into witnesses, (which had substantially been their only office,) held any testament to be valid made in the presence of seven witnesses, provided their seals were attached (4); a new formality not required

(1) When the testament was not written, the formula was modified.

(2) Indeed we may say the whole testament was in the *tabulæ testamenti* confirmed by *nuncupatio*—the rest was mere show.

(3) The prætorian testament existed even in the time of Cicero (In Ver. c. 1, 45). Probably it was introduced to enable the *peregrini* to make a testament, for they were not entitled to use the one *per æs et libram*, which was confined to Roman citizens.

(4) The custom was introduced of sealing (*signare*) the testamentary tablets, so that it should be impossible to read them or to alter them without breaking the seal. The prætorian edict confirmed this custom, and made it a regular form, by requiring that the seven witnesses should each affix his seal (*signaculum annulum*).

by the civil law. The testament thus made being void, according to the civil law, did not pass the *hereditas* (proper): but the prætor gave it effect by granting to the hæredes appointed by it (*instituti*) possession of the goods of the deceased (1) (*Bonorum possessio*).

Q. What was the form of a testament after the time of Theodosius II.?

§ 3. A. The emperors, in their Constitutions, following out the principles of the prætors, abolished the mere forms and adopted a new sort of testament (2), for the validity of which three conditions were essential:

1. Unity in the making (*uno contextu*): i. e., all the formalities, from the presenting of the testament to the signing and sealing of the witnesses, were required to be completed at once, without the interposition of any act not bearing on the testament, unless it was an act demanded by nature, or by the bodily health of the testator.

2. The presence of seven witnesses. It was required that they should be specially summoned for the purpose, *testamenti celebrandi gratia*, or, at least, informed as to the nature of the act in which they were to take a part. The testator produced to them his testament written before-hand, or at the time, by himself or by his direction. If it was not written by the testator, he had to affix thereto, in presence of the witnesses, his *subscriptio*, i. e., his name or signature.

3. The signature of the witnesses (*subscriptiones*), and their seals (*signacula*). When the testament was opened the witnesses affixed their signatures to it; and after it was closed their seal (3). If a testator wished to make a secret

(1) The *possessio bonorum* was to the *hereditas* (proper) what the *bonitarian* was to the *quiritarian* ownership (B. 3, t. 9).

(2) In later times, when every subject of the empire was a Roman citizen, when, therefore, the peculiarities of the old *jus civile* had lost their significance, legislation, i. e., the imperial Constitutions, showed a general tendency towards the principles of the Prætorian law (§ 3). *Paulatim capit in unam consonantiam jus civile et prætorium jungi*. The imperial legislation as to testaments is mentioned here as an instance of this fusion.

(3) The witnesses might use each a different seal, or all the same (§ 5) (a). For further certainty, therefore, each witness, be-

(a) The freedmen who, before Justinian's time, had no right to wear rings, could not have been witnesses, had every witness been required to use his own seal.

testament, the contents of which should be unknown, he produced it sealed, tied, or rolled up, so as to conceal the writing, at the same time declaring it to be his testament; he then signed it, in presence of the witnesses, on the end left open; or, if he could not write, from ignorance or incapacity, an eighth witness subscribed for him. The witnesses then affixed their names to the testament; and, having shut it up, attached their seals.

Q. Did Justinian add any form besides?

§ 4. A. To prevent fraud he required the name of the *hæres* to be written by the testator himself, or by one of the witnesses; but this form was afterwards abolished by Novella, 119, c. 9.

Q. What was this new form of testament called?

§ 3. A. *Tripartitum*. For the conditions as to *uno contractu*, and the presence of the witnesses, were derived from the *civil*, i. e., the old law; the number (1) seven, and the affixing of the seals from the *prætorian* law; and, lastly, the necessity for signing, from the imperial Constitutions.

Q. Who may be witnesses to a testament?

§ 6. A. As a general rule, any person with whom the testator has *testamenti factio* (2). The following were excepted:—

§ 6. 1. Women, who were not, if possible, to appear in civil matters. 2. *Impuberes*, lunatics, and persons deaf or dumb; because such persons could not understand, or

sides sealing the testament, wrote with his own hand, by whom and on whose testament the seal was affixed.

(1) This rule is said to be derived from the Prætors, for of the seven persons required to be present by the civil law only five were witnesses; it was the Prætors who converted the *libripens*, and the *emptor familiæ* into the sixth and seventh.

(2) Originally, i. e., whilst the testament was by a solemn sale (*mancipatio*), none had the *testamenti factio*, who were incapable of acquiring property in that form; which included not only those who had not the *commercium*, as *peregrini* and prodigi under *interdict*, but all who were physically or morally incapable of taking part in the *mancipatio*. After the *hæres institutus* had ceased to be *emptor familiæ*, or to concur personally in making the testament, the number of those having *testamenti factio* was enlarged; indeed, the only parties excluded were persons who neither in their own nor in their master's right enjoyed civil rights, viz. *peregrini* (after Caracalla's time, not a numerous class) and *deportati* (tit. 14, *post*).

report, or hear, so as to bear witness. 3. *Prodigi*, debarred from the management of their own property by interdict (1). 4. Persons declared infamous, or incapable of bearing witness in court. 5. Slaves, who in their own right had no civil rights.

Q. At what period was it necessary that a witness should be found capable?

§ 7. A. At the making of the testament: incapacity before or subsequent to this was unimportant.

Q. Suppose a slave believed to be free was summoned as a witness, was the testament valid?

§ 7. A. Yes: if at that time he was by common repute free, and no one then disputed his *status*.

Q. Besides these cases of absolute incapacity, which excluded a man from being a witness to *any* testament, were there no cases of relative incapacity which excluded a man from being a witness to *particular* testaments?

§ 9. A. Yes. A member of the same family with the testator was not a competent witness to his testament. Thus a *filius-f.* could not attest the will of his *pater-f.*: neither could father nor brother of the testator attest the will of a *filius-f.*, by which he disposed of his *peculium castrense* or *quasi castrense*, after leaving the army.

Q. Might a *pater-f.* and his *filius-f.*, or two brothers, attest the will of a person not of their family?

§ 8. A. Yes. Although attestation by members of the same family, *domesticum testimonium* (§ 9), was forbidden, that was only where the testament of one of the members was in question.

Q. Were the *heres institutus* and the members of his family competent witnesses?

§ 10. A. No: for a man could not bear witness for himself (2).

(1) Their testimony was rejected, not because they could not make a testament, but because, having had the capacity to make, they had been found unworthy to retain it.

(2) In the old testament *per as et libram*, the *heres* was purchaser, and as such excluded, *with all his familia*. After he had ceased to be *emptor familiae*, it was thought he might be considered a stranger to an act between the *emptor* and the testator; but several jurists recommended that he should not appear as a witness. And Justinian very properly made this recommendation imperative, for in the tripartite testament the only parties really concerned were the testator and the *heres*: the transaction was *inter*

Q. Might legatees, cestui-que trusts, and testamentary tutors be witnesses?

§ 11. A. Yes. As they did not succeed to the *hereditas*, which constitutes the real essence of the testament, it was not thought necessary to reject them as witnesses thereto, notwithstanding their interest in its validity, upon which of course depended whether its dispositions in their favour should take effect: indeed, Justinian settled this point by a special Constitution. Still less would any of the family of a legatee or of a cestui-que trust be deemed incompetent.

Q. On what material might a testament be written?

§ 12. A. On tablets, paper, parchment, or any other material.

Q. Might several originals (*codices*) be made of the same will?

§ 13. A. Yes: and it was often useful to do so; for one of them might be lost. The production of one *codex* was enough, if framed according to the required forms.

Q. Besides written testaments were there any verbal ones?

§ 14. A. Yes. The testament *per æs et libram* required no writing: for neither *mancipatio* nor *nuncupatio* required it. Instead of producing the written tablets, and confirming them by pronouncing the formula, the testator might verbally declare his intentions, and nominate his *hæres* aloud. Probably, in old times, when writing was less common, most testaments were made in this form. This naming of the *hæres* was properly called *nuncupatio*, (*palam nominare*), though that term was afterwards used to denote the declaration by which a man confirmed a written testament without pronouncing the name of the *hæres*.

The imperial Constitutions, whilst they simplified testamentary forms, retained this verbal or *nuncupative* form, in which the testator declared his intentions before seven witnesses (1).

testatorem et hæredem, as formerly *inter testatorem et familia emptorem*.

(1) Such testament, when made *uno contextu* and before seven witnesses, was valid by the civil law (*perfectissimum*, § 14); of course, it could not be sealed as the *prætorian* law directed; nevertheless, the prætors, as executors of the civil law, gave effect to it by granting the *possessio bonorum*.

TITLE XI.—OF THE TESTAMENTS OF SOLDIERS.

Q. Was any class of persons relieved from compliance with the above rules as to testaments?

Pr. A. Yes. Soldiers in the field were relieved by the imperial Constitutions. Therefore, provided only a soldier, by some means or other manifested a clear intention to make a testament, his testament was valid. The form was nothing. It was enough to show his intention; and this might be proved by any writing or (*sine scriptura*) by witnesses (1).

Q. Why do you say that *the soldier must manifest a clear intention*?

§ 1. A. I mean that vague words used in conversation (*ut sermonibus fieri solet*) would not suffice. It must be proved that the soldier verily intended to make a testament (2).

Q. Does the privilege of being exempt from the ordinary solemnities of testaments attach to soldiers at all times and in all places?

Pr. A. No. It attaches to none but those in the field. Of testators in camp; those who never were or have ceased to be soldiers, *e. g.*, veterans; of testators not in camp, all, whether soldiers or not, were bound to observe the regular forms.

Q. Is the testament of a soldier valid after he has left the service (*post missionem*)?

§ 3. A. It remains valid for one year only after he has left (3). If the veteran, therefore, died within the year, his informal testament, made before leaving the service, continued valid, even when the appointment of the *hæres* was conditional, and when, consequently, the testament could not be executed till the condition was fulfilled.

(1) Prior to the emperors of the lower empire, who introduced the maxim *testis unus testis nullus*, one witness was probably enough.

(2) In the case referred to (§ 1), the summoning of the witnesses to hear his last will is mentioned, not because witnesses were necessary to the validity of the will, but to show that the soldier really intended to make one.

(3) *I. e.*, if his dismissal was honourable (*honeste*); but if he was dismissed because of his unworthiness to serve, his testament, unless made in regular form, was null from the date of his dismissal.—The privilege of a soldier attached when he was enrolled (*in numeris*).

But if he did not die within the year, the veteran was bound to substitute for his military testament a formal one.

Q. Did a testament, originally informal, become valid by the testator becoming a soldier, and so acquiring the right to make an informal testament (*non jure*)?

§ 4. A. No: but it might be held valid *ex nova militis voluntate*, if the testator, after enlisting, either added to it or subtracted from it, or in some way manifested his intention to give validity to that which was originally void. In truth, such intention is itself a testament; for a soldier who confirms a testament in fact remakes it.

Q. When a soldier suffered *diminutio capitis*, did not his testament, though prior in date to his change of status, continue valid just as if it had been made after such change?

§ 5. A. Yes. By common law, when a testator suffered *diminutio capitis*, his testament became void (*irritum*) and its validity was not restored by his resuming his former status (t. 17, *post*); though of course he might make a new testament, unless there was anything in his new status to prevent him. But, by privilege, soldiers on changing their status (1) did not require to remake their testaments. It was presumed that they adhered to that already made, so far as those goods were concerned, over which, notwithstanding their change of status, they continued to have a disposing power (2).

(1) This refers particularly to the *minima*, or change of family; for if a testator lost his freedom or citizenship, he was no longer a soldier, and had no more power to make a testament. A rescript of Hadrian, however, gave this power to soldiers condemned for a military offence; from which Ulpian concludes, that the testament of a soldier, made before *condemnatio*, continued valid after it.

(2) If, therefore, a military *pater-f.* had by testament disposed of all or even of a part of his goods—for soldiers might die partly testate and partly intestate—and he became *adrogatus*, and so ceased to be *sui juris*, his will, instead of being void, as would have been the case at common law, took effect upon those goods which he still had in his disposition; *vis.*, his *peculium castrense*. So, if a military *filius-f.* had by testament disposed of his *peculium castrense*, and then was emancipated, being still a soldier, his testament was held to apply to his new status, and took effect, not merely upon his *peculium castrense*, but also upon all his goods, just as if it had been made after emancipation.

Q. Were not certain persons, being soldiers, allowed to make wills, who would otherwise have been incapable to do so?

§ 2. A. Yes: *e. g.*, filii-f., persons deaf and dumb (1). — § 6. But afterwards filii-f. obtained the power of bequeathing by an ordinary testament their *peculium castrense*, even after they had left the army. In like manner, also, they might dispose of their *peculium quasi-castrense*. As to those deaf and dumb, Justinian laid down certain rules, on complying with which such persons, even though not in camp, were entitled to make a testament (p. 129).

TITLE XII.—OF PERSONS NOT HAVING THE POWER TO
MAKE A TESTAMENT.

Q. In order to determine the validity of a testament, is it sufficient to ascertain that the necessary forms have been complied with?

Pr. A. No. The essential point to be ascertained is, whether the testator had the *testamenti-factio*, *i. e.*, the capacity of making a testament (Gaius, 2, § 114). Now this capacity belonged to those only on whom it had been conferred by law: for the incapacity to make a will is simply the non-permission to do so.

Q. To whom was the *testamenti-factio* allowed?

A. By the Twelve Tables it was confined to patres-f. (2). Filii-f. could make no testament (§ Pr.), even with the pater-f.'s consent: for the *testamenti-factio*, which set aside the legal order of succession, was a privilege of public law, and could be granted only by the law.

Augustus, Nerva, and Trajan allowed filii-f. to bequeath their *peculium castrense*, but only whilst on active service. Adrian allowed the same privilege to filii-f. veterans (3).

(1) *Deaf and dumb persons.* These must be soldiers who have met with some accident, and are about to leave the service.

(2) *I. e.*, citizens *sui juris*. Citizens alone could make a testament, and of these, patres-f. alone could do so, for they were the only proprietors. The right afterwards obtained by filii-f. to have property of their own did not involve the right to dispose thereof by testament; that required the interference of the legislature.

(3) Prior to Justinian, if the filius-f. did not dispose of the *peculium castrense*, it belonged to the pater-f., not as hæres or suc-

In course of time (Pr. *præter*) the right to bequeath the *peculium quasi castrense* was allowed to some filii-f. : Justinian allowed it to all.

Q. Were filii-f. ever allowed to bequeath the *p. adventicium* ?

Pr. A. No : the *p. castrense* and *quasi castrense* were the only goods which they were allowed to bequeath.

Q. Had all patres-f. power to make a testament ?

§§ 1, 2, 3. A. In the *testamenti-factio* we must distinguish the right itself from the exercise of the right. Now all patres-f. have the right to be testators, but all have not the power of exercising that right ; for the *testamenti-factio* implies a combination of qualities which the law does not bestow, but the absence of which debars a man from making a valid testament, though it does not debar him from retaining a testament which has been once made either by him or for him (t. 16). Thus, *impuberes*, lunatics, spendthrifts, deaf and dumb persons, even though *sui juris*, can make no testament. But if one has been regularly made, it is not annulled by lunacy or infirmity supervening, or by the pronouncing of an interdict (1).

Q. Did the testament made by an *impubes*, a lunatic, &c. continue null, after the testator became *pubes* or sane ?

§ 1. A. Yes. Acts, originally null, never become valid by lapse of time, *quod ab initio nullum est, nullo lapsu temporis convalescere potest*.

Q. Why were lunatics and *impuberes* held incapable of exercising this right ?

§ 1. A. Lunatics, because they had no understanding ; *impuberes*, because, though not without understanding, they had no judgment (*animi iudicium*) (2).

Q. Were all deaf or dumb persons incapable of making a will ?

§ 3. A. Prior to Justinian they were, unless the usual forms were dispensed with, on the ground of their being

cessor, but as proprietor, by virtue of his *potestas (jure communi)*. Justinian (Pr. *si vero*) decreed that the *p. castrense* should not go to the father if there were any children or brothers (B. 3, t. 3).

(1) Because lunacy only puts an end to the possibility of exercising the right. It is different when the right itself is extinguished.

(2) *Impuberes* might acquire the *hereditas* of another if they had the tutor's authority, but could not make a will even with his authority. The testament made by a lunatic (*furiosus*) in a lucid interval was valid (§ 1).

soldiers, or personally privileged by the emperor; for persons either deaf or dumb could make no testament by the common law (1): the latter, because they could not summon; the former, because they could not hear the witnesses; for observe, the deaf person here is one absolutely deaf, not one who hears with difficulty; and the dumb person is one who cannot speak a word, not one who speaks with difficulty.

But Justinian decreed, that by observing certain forms, persons not born deaf and dumb (*certis casibus*), should have power to make a will, and to do any act for which, setting aside this infirmity, they had a legal capacity.

Q. Were blind men ever incapable of making a will?

§ 4. A. Never, because their infirmity did not prevent them summoning and hearing the witnesses: Justin, however, to prevent fraud, ordained the observance of certain formalities in this case (2).

Q. Could a Roman citizen, in the hands of the enemy, have a testament?

§ 5. A. Slavery extinguished the right to make a testament. His testament, therefore, made whilst in the hands of the enemy, was null, even in case of his return (*quamvis redierit*). So his testament made before captivity ought strictly to have been null, but its validity was sustained by means of two fictions: the one, which applied to the case of return, obliterated the term of his captivity, and considered him as one who had never quitted the Roman territory (*jure postliminii*); the other, introduced by the *lex Cornelia*, A. U. C. 686, assumed that the prisoner who died a captive died at the first moment of his captivity, whilst his rights were still complete.

TITLE XIII.—OF THE EXHEREDATIO OF CHILDREN (3).

Q. When the testator had sons under his *potestas*, but wished to transmit his *hereditas* to a stranger, was it

(1) Neither deaf nor dumb persons could make a testament *per as et libram*; the former, because they could not hear the words used by the *familia emptor*; the latter, because they could not pronounce the words of *nuncupatio*.

(2) Besides the seven witnesses, the testator was to be assisted by a notary (*tabularius*), or an eighth witness, whose duty it was to write the testament at the blind man's dictation, or to read it over to him, that he might declare whether it was his last will.

(3) We now proceed to explain those restrictions which were

enough for him to appoint (*instituere*) such stranger *hæres*?

Pr. A. No: he was required to disinherit (*exhæredare*) his sons expressly.

Q. Whence arose the necessity for this?

Pr. A. It seems to have followed from the principle, that members of the same family were in some sort joint-proprietors of the family goods: so that, at the death of the head of the family, its surviving members rather retained such goods than acquired them for the first time (1). Hence the *prudentes* were of opinion that the *hæreditas* should not pass to a third party, unless the pater-f. took it away from those who already had it; and so the rule was established that whoever had a son in his power should in express terms either appoint him *hæres* (*instituere*) or disinherit him (*exhæredare*), on pain of the testament being void.

Q. If the son omitted from the testament died before the pater-f., was the testament still void?

Pr. A. Yes, because it was so in its origin.

Q. Might the *institutio*, or *exhæredatio*, be subject to a condition?

A. Yes, if the condition was *potestativa*, i. e., dependent for its fulfilment on the will of the son. As to *institutiones* and *exhæredationes* subject to *casual* (2) conditions, they were valid only if the son survived the event; for when the condition was not fulfilled till after the son's death, inasmuch as the son had not been *institutus* or *ex*

gradually imposed on the testator's absolute power of making any dispositions by testament they pleased, which was granted by the Twelve Tables: *uti legasset . . . ita jus esto*. These restrictions may be summed up thus: 1. A testator was not permitted to pass over his children in silence; if he meant to disinherit them, he must do so expressly, otherwise his testament was void (t. 13). 2. But even though he did expressly disinherit them, he must leave them one-fourth (*quarta legitima*), i. e., of the share they would have taken had he died intestate, otherwise his testament might be declared *inofficious* and void (t. 13). 3. To prevent the pater-f. from evading the spirit of the law by appointing his children as his legal representatives (*hæredes*), but so encumbering them with legacies as to reduce their beneficial interest to something merely nominal, the *lex Falcidia* secured the *hæredes instituti* in one-fourth at least. The interests of the children were further secured by the *possessio bonorum* (B. 3, t. 1).

(1) Hence the name *sui hæredes*, heirs of themselves (t. 19, *post*).

(2) Dependent for their fulfilment on a contingent event.

heredatus during his life, he never could have been so at all, and therefore the testament was null (t. 14). So, when a son was instituted in case of the fulfilment, and disinherited in case of the non-fulfilment, of a casual condition, e. g., "*If such a ship returns my son shall be hæres, if not he shall be disinherited*:" then, if the son died before the vessel returned, and before it was ascertained whether or not she would return, he had never been either instituted or disinherited, and therefore the testament was null.

Q. If the person improperly omitted from the pater-f., testament was a daughter, or any more remote descendant, did that avoid the testament, as when such person was a son?

Pr. A. No: but these omitted persons had the *jus accrescendi*, i. e., were entitled to come in with the *hæredes instituti* for a certain share.

This share was a half when the *hæredes instituti* were *extranei*, i. e., not of the *familia*; and it was *pars virilis*, an equal share, when they were (*sui hæredes*) members of the *familia*: in other words, the whole of those omitted increased the number of the *sui hæredes instituti* by one, and thus took half the *hæreditas*, if there was only one *sui hæres institutus*, and a third or a fourth, according as there were two or three *sui hæredes instituti*.

Q. Did the *jus accrescendi* attach to every one of the grandchildren and more remote issue?

A. No: only to those grandchildren whose father had died previously, or suffered a *diminutio capitis*; for whilst the father was in the family of the grandfather the grandchildren had no direct rights over the family-goods, because their rights were their father's: he, not they, was *sui hæres*, or joint-proprietor of the *hæreditas*; hence it was not necessary to divest them of a title and rights which they never possessed, and therefore they were not, but their father was the person to be disinherited.

Q. Was there not a further difference between the son and the other issue, as to the form of the *exhereditatio*?

Pr. A. Yes: the son was to be disinherited by name (*nominatim*); thus, *Titius exhæres esto*: or if the testator had only one son, *filius meus exhæres esto*. Daughters and grandchildren might be disinherited in the mass (*inter ceteros*), as when the testator, after appointing one or more children *hæredes*, added *ceteri exhæredes sunt*.

Q. Was it necessary that posthumous children should be *instituti* or *exhereditati*?

§ 1. A. Yes: for the time of conception fixed the rights

of legitimate children, so that those conceived before the testator's death, though born after it, were held to be his *sui hæredes*, and could not be divested of that title except by *exhæredatio*.

But a child though conceived acquired no rights, unless when born it was likely to live: hence a testament from which a posthumous child was omitted was not void, as in the case where a son already born was omitted; in its origin it was valid, and might be carried into effect, though a woman enceinte with a posthumous child miscarried, but it was avoided (*rumpetur*) by *agnatio*, i. e., by a new hæres being born into the family.

Q. Was the testament absolutely avoided by the birth of a posthumous child of any sex or any degree, who had been omitted by the testator?

A. Yes: the birth of a posthumous male or female child or grandchild, absolutely avoided the testament: though it was not so if the person omitted was a daughter or granddaughter already born (p. 131).

Q. Had it always been possible to secure the non-avoidance of a testament by instituting or disinheriting postumi?

A. No: for the rule of law was, that there could be no testamentary gift to a person unascertained (*incertus*), which a postumus certainly was: but the *Prudentes* regarded the *postumus* as born before the testator's death, and even at the time of making the testament. Hence there were two kinds of postumi: those who, if born before the testator's death, would have been *sui hæredes* of the testator, who were called *postumi sui*; and those who would not have been *sui hæredes* of the testator, though perhaps members of his family; who were called *postumi alieni*. By the civil law, at least, these last still continued incapable of being instituted as *hæredes* (*vide*, tit. *Legacies*;) but to *postumi sui* it was competent for the testator to make every sort of testamentary disposition. Thus, they might be instituted or disinherited, or legatees or a tutor might be nominated for them (p. 39).

Q. How were postumi disinherited?

§ 1. A. Daughters and granddaughters postumæ might be disinherited in the mass, (*inter ceteros*) provided something was bequeathed to them, to prove that they were not omitted because forgotten; but it was necessary that all male postumi, whatever their degree of relationship, should be disinherited by name, thus: *quicumque mihi filius genitus fuerit exhæres esto*.

Q. Did children who were born or became *sui hæredes*, after the making of the testament, and before the death of the testator, resemble *postumi*, so far as to avoid (*rumpere*) the testament from which there were omitted?

§ 2. A. Yes. The *Prudentes* did not allow such children to be instituted or disinherited beforehand, because the testator might remake the testament which had been avoided. Nevertheless it was allowed by a special law, the *Junia Velleia* (A.D. 10), which assimilated such children to *postumi*; and hence they were called *quasi-postumi* or *postumi Velleiani* (Gai. 2, 134).

Q. How many kinds of *quasi-postumi* were there?

A. 1. *Sui hæredes*, born after the testament was made, and before the testator died. 2. Grandchildren, whose father had left the family after the testament was made, and before the testator died; such grandchildren taking their father's place, became *sui hæredes* of the grandfather: and, if omitted from his testament, avoided it just as *postumi* and *quasi-postumi* avoided it, by being born (*quasi agnascendo*) (1). 3. *Hæredes sui*, who became so by *adoption*, or by *legitimatio* after the testament was made. 4. Grandchildren who, on their grandfather's death, became *sui hæredes* of their father, and, as such, avoided the testament which he had made, whilst a *filius-f.*, in order to dispose of his *peculium castrense*, or *quasi-castrense*.

Q. Was it necessary to institute or to disinherit emancipated children?

§ 3. A. Not by the civil law; but the prætor, ignoring the emancipation, granted the *possessio bonorum contra tabulas* (in opposition to the will) to the emancipated children omitted from the testament. The testator, therefore, in order to make certain of having his last will carried into effect, instituted or disinherited emancipated children if males, by name, if females, by name or in the mass.

(1) The *lex Velleia* was required, not to enable the grandfather to institute this second class of *Postumi*, for, being in existence when the testament was made, they might be instituted like any body else, but it was required to enable the grandfather to disinherit them beforehand, and in case they should become hæredes; for, by common law, it was not competent for a testator, before the death or emancipation of the father, to divest persons of the title of *sui hæredes* of the grandfather, which as yet they did not possess.

Q. Did the prætor in like manner grant the *possessio bonorum contra tabulas* to emancipated sons' children born after emancipation, although they had never been subject to the grandfather-testator?

§ 3. A. Yes. As a general rule the prætor granted such *possessio* to all who were *sui hæredes* by the civil law, and to all who were excluded from that class by the civil law, simply because they had suffered a *minima diminutio capitis*; provided always that such *possessio* was claimed by the issue omitted from the testament; for if it was not, the prætor granted it *secundum tabulas* to the *hæredes instituti*, even when by the civil law the testament would have been held void, because a *sui hæres* (proper) had been omitted. Thus, when the *quasi-postumus* whose *agnatio* or *quasi-agnatio* had avoided the testament, died before the testator, the prætor gave effect to the testament by granting the *possessio bonorum secundum tabulas* to the *hæredes instituti*.

Q. Was it necessary to institute or to disinherit adopted sons?

§ 4. A. Whilst adopted children were in the adopted family, they occupied the same position there as offspring of a lawful marriage; and it was necessary for the adopting father to institute or disinherit them, as if they had been his legitimate offspring; but once emancipated by their adopted father, they ceased to be his children either by the civil or the prætorian law. On the other hand, as to the natural father, his children, who had become members of an adopted family, were strangers to him, because they could not belong to two families at once; but as soon as emancipated by their adopted father they became like children who had been emancipated by their natural father; and the prætorian law directed him to institute or disinherit them in express terms.

Q. Did Justinian alter the law on this subject?

§ 5. A. Yes: he abolished all distinction between the sons and other issue (*i. e.* descendants), between posthumous males and posthumous females; and he decreed that all the issue, whether *sui hæredes* or emancipated (to be disinherited), must be so by name, whatever their degree of remoteness, and whatever their sex; and that, if they were omitted from the testament, it should be absolutely null. As to adopted children, the changes made by Justinian as to adoption, rendered it unnecessary to disinherit any persons except those *adrogati* or filii-f. adopted by an ancestor; for they alone (at least generally) continued to pass under the power of their adopter (B. 1, t. 11).

Q. Were soldiers obliged to disinherit by express words those children whom they would not appoint (*instituere*) *hæredes*?

§ 6. A. No: the silence of a military testator was sufficient to exclude his children from the *hæreditas*, provided he was aware of the existence of such children, whether born or only conceived; for though the intention to disinherit need not be expressed, still it must be proved as a fact; and therefore, as the existence of *hæredes*, forgotten by the testator, rendered a soldier's testament void ab initio, so the coming into existence of *hæredes* likewise forgotten rendered it thenceforth ineffectual.

Q. Were the mother and the maternal ancestors obliged to institute or to disinherit their issue?

§ 7. A. No: the only persons whom it was necessary to disinherit were the *sui hæredes*, and those whom the prætor regarded as such, notwithstanding their emancipation. Now, children were not *sui hæredes* of their mother or of their maternal grandfather; because they were not members of the family of either. The silence of the mother or of the maternal grandfather in their testament had therefore the same effect as when the father expressly disinherited; and the only case in which a child could impugn the mother's testament, from which it had been omitted, was the case in which it would have been competent for such child to impugn a father's testament, from which it had been excluded, *viz.* when the will was void, as *inofficiosum* (t. 18, *post*).

TITLE XIV.—OF THE APPOINTMENT (INSTITUTIO) OF HÆRDES.

Q. Define the *institutio hæredis*.

A. It is the appointment of the person or persons whom the testator desires to be his *hæres*, *i. e.*, to be his general representative; in other words, the individual or individuals who are to continue his legal person.—This appointment was essential to the validity of all the particular dispositions made by the testator: so that if it failed, either on account of the *hæres* refusing to accept, or otherwise, the legacies and other dispositions, which may be regarded as so many laws imposed upon the *hæres institutus*, and as incident to the institutio, also failed (1).

(1) Originally, certain formal words were used for this purpose: *Titius hæres esto*—*Titium hæredem esse jubeo* (Gaius, 2, 116

Q. Who may be *hæredes instituti* (appointed successors?)

A. A testator may institute those with whom he has *testamenti-factio* (t. 19, *post*), i. e., any Roman citizen (1). Hence, neither *peregrini* nor *deportati* could be *instituti*.

Q. Was every citizen capable of being appointed *hæres*?

A. No. Thus, by the old law, and by the *lex Voconia*, A. U. C. 585, women could not be appointed *hæredes* by a testator being in the first class of the census, i. e., possessing 100,000 asses. Under Justinian this was repealed. But apostates and heretics remained incapable. Incestuous children could not be appointed by their father or mother; nor the second husband or wife by his or her partner, if there were any children by a first marriage; nor natural children by their father, if he had legitimate children.

Q. May slaves be appointed *hæredes*?

Pr. A. Yes: a testator may appoint the slaves of another, if he have *testamenti factio* with their master or his own slaves, by bequeathing them liberty, so that they become citizens.

Q. Is a master who institutes his own slave, bound to enfranchise him expressly?

Pr. A. By the old law he was; because the old forms of enfranchisement prevented its being tacit. Justinian, however, decreed that the mere fact of being instituted by his master should be deemed a tacit enfranchisement (2).

& 117). But Constantine II., A. D. 389, decreed that any words should be sufficient. Moreover, this *institutio* was originally required to head the testament (*caput testamenti*); but *vide* t. 20, § 34.

(1) A testator had *testamenti factio* with municipalities and other corporations legally constituted. By the old law, no temples could be *hæredes instituti* except such as were designated by a Sc. or an imperial Constitution. Prior to Justinian's time, *Latini Juniani*, who had the *jus commercii*, and were capable of appearing as *emptores* in the *mancipatio* might be *hæredes instituti*; hence there was *testamenti factio* with them. But they had not the *jus capiendi*; i. e., they could not derive any benefit from the appointment unless after the making of the testament and before accepting the *hæreditas*, they became citizens (Gaius, l. 23, 24). So *cælibes* (unmarried persons without children), and *orbi* (married persons without children), by the laws *Julia* and *Papia Poppæa* had the *testamenti-f.*, but not the *jus capiendi*.

(2) *Vide* B. 1, t. 6, § 2. Enfranchisement, express or implied, is

Q. May a testator institute the slave whereof he has only a bare property?

Pr. A. Yes: a slave so instituted will become free, but must remain in the service of the usufructuary during the term of his usufruct. For he who has the bare property in a slave is held to be the proprietor (1).

Q. How does a slave, instituted by his master, become *hæres*?

A. When the appointed slave remains the slave of the testator till the testator's death, such slave becomes free and *hæres necessarius* at once (B. 1, t. 6, § 1; B. 2, t. 19, § 1).

§ 1. But if he has been enfranchised during the testator's life, then, as the testament does not convey to him his freedom and the *hæreditas* at once, he cannot become *hæres* except voluntarily, and by accepting the *hæreditas*; lastly, if the appointed slave has been alienated after the making of the testament, he cannot become *hæres* unless he accept the *hæreditas* by command of his new master.

Q. When another man's slave is instituted, how does he become *hæres*?

§ 1. A. On accepting the *hæreditas* by command of his master, if he continues subject to the same (*in eadem causa*); if he has changed his master, he must accept the *hæreditas* by command of his new master (2); if he has been enfranchised during the testator's life, or after his death, but before the *hæreditas* was accepted, he must accept and acquire the *hæreditas* voluntarily and for his own benefit.

Q. After the death of A., and before any one, by accepting his *hæreditas*, assumed the place of A.'s successor, might B. institute the slaves left by A. as part of his *hæreditas*?

§ 2. A. Yes: even though there was no *testamenti factio* with slaves except in right of their master: for until the *hære-*

essential to the validity of the *institutio*: and if the enfranchisement is impossible, the *institutio* is void. Hence, a woman accused of adultery with her slave could not appoint him *hæres* before judgment pronounced in the suit, because, till then, she could not enfranchise him (Pr.).

(1) For the *usufructus* is a right in the thing belonging to another.

(2) The *hæreditas* is acquired by the slave's owner at the time of acceptance. Until acceptance, the benefit of the *institutio* follows the slave, *hæreditas ambulat cum domino*.

ditas was accepted, it represented the deceased, and continued his person (*vicem personæ defuncti sustinet*). It was competent, therefore, for a testator to institute slaves forming part of a *hæreditas* until such *hæreditas* was accepted, in any case where the testator had *testamenti-factio* with the deceased, even though he might not have it with the future *hæres*. Hence, though a testator might have no power to institute a posthumous child, he might have power to institute the slaves which were about to belong to the posthumous child at its birth, as part of that *hæreditas* which was about to vest in him as *postumus suus* of the deceased.

Q. When a slave belonging to several masters was instituted, for whom did he acquire the *hæreditas*?

§ 3. A. For each of the masters with whom the testator had *testamenti-factio*, and who directed him to accept it for them: not, however, in equal shares, but in proportion to the shares held by each in the slave.

Q. Suppose a slave, held as joint-property, was instituted by one of his masters, what then?

§ 3. A. If freedom was expressly given by testament, the slave became free, provided the other joint-owners were indemnified. But if freedom was not expressly given, I question whether one of several masters, who institutes, must be taken to enfranchise. Where there is only one master, the slave must be enfranchised or the testament must be void; but where the slave has several masters, he may accept the *hæreditas* for their benefit, and yet remain a slave (B. 2, t. 7, § 4).

Q. May a testator institute those whom he has never seen?

§ 12. A. Yes: even under the old law, according to which there was no *testamenti-factio* with *incerti*, for a person who has not been seen is not *incertus*, provided that a clear idea of him as an existing being has been formed. Thus I may institute my nephews born abroad, though I have never seen them.

Q. May a testator appoint several *hæredes*?

§ 4. A. As many as he pleases. All the *instituti* (appointees) are called to the whole *hæreditas*; in other words, the whole vests in them, either jointly or successively, i. e., in some failing the others: for the rule of law is, that a man cannot die partly testate and partly intestate. The testator's power, however, is confined to this, *viz.*, defining the share to be taken by each *hæres institutus*, in case several *hæredes* should come in jointly in fact.

Q. How was the *hæreditas* usually divided?

§ § 5, 8. *A.* The *hæreditas* called *as* (1), an expression which amongst the Romans denotes unity or the dividend, was usually divided into twelve equal parts, called *uncia*. And this division the testator is supposed to adopt, when there is nothing to indicate the contrary.

Q. Suppose the testator has appointed one *hæres*, and given him six *uncia* (*semissem*?)

§ 5. *A.* In this case the testator cannot be supposed to have divided the *as* into twelve *uncia*, unless you assume that he has disposed of only half his *hæreditas*, and consequently intended to die partly testate and partly intestate. Therefore it is assumed that he has divided the *as* into six *uncia*, i. e., into sixths, not twelfths. But a soldier's testament is privileged, and therefore, if he has disposed only of six *uncia*, he will be taken to have disposed of only half his *hæreditas*.

Q. What if the testator has distributed amongst the several *instituti* more or less than twelve *uncia*; suppose, e. g., three *instituti* and three *uncia* (*ex quadrante*) to each, or four *instituti* and four *uncia* to each?

§ 7. *A.* In the first case the *hæreditas* must be divided into nine, in the second into sixteen *uncia*: each *hæres*, therefore, would in the first case have three-ninths or one-third, and in the second four-sixteenths or one-fourth. If the testator gave each of the *instituti* unequal shares, there must be a proportionate increase or decrease. Suppose two *hæredes* appointed, the one to six, the other to three *uncia*, the *as* must contain nine *uncia*, and the first must have six-ninths or two-thirds, and the second three-ninths or one third.

Q. What if the testator assigned no specific share to any of the *instituti*?

(1) The addition of several $\frac{1}{12}$ or ounces makes up the fractions to which particular names have been given; thus:

2 <i>uncia</i> or $\frac{2}{12}$	= $\frac{1}{6}$	<i>sextrans</i>
3 " $\frac{3}{12}$	= $\frac{1}{4}$	<i>quadrans</i>
4 " $\frac{4}{12}$	= $\frac{1}{3}$	<i>triens</i>
6 " $\frac{6}{12}$	= $\frac{1}{2}$	<i>semis</i>
8 " $\frac{8}{12}$	= $\frac{2}{3}$	<i>bes</i> (<i>bis, triens</i>)
9 " $\frac{9}{12}$	= $\frac{3}{4}$	<i>dodrans</i> (<i>demo, quadrans, 1 - $\frac{1}{4}$</i>)
10 " $\frac{10}{12}$	= $\frac{5}{6}$	<i>dextans</i> (<i>demo, sextrans 1 - $\frac{1}{6}$</i>)
11 " $\frac{11}{12}$	= $1 - \frac{1}{12}$	<i>deunx</i> (<i>demo uncia</i>)
5 " $\frac{5}{12}$	=	<i>quincunx</i>
7 " $\frac{7}{12}$	=	<i>septunx</i>

§ 6. A. Each is entitled to an equal share. But if several *hæredes* are appointed jointly, *i. e.*, by a single disposition, they are regarded as one, and take one share; *e. g.*, if the testator, after instituting *Titius*, appoint *Mævius* and *Paul*, these two take one half (six *unciae*) and *Titius* the second half.

Q. What if the testator assigned shares to some only of the *instituti*?

§ 6. A. The others take what remains of the twelve parts. If, therefore, *Titius*, *Caius*, and *Cenis* are appointed *hæredes*, the first to three *unciae*, the second to four, no share being assigned to *Cenis*, *Caius* takes five *unciae*.

Q. If the shares assigned to some of the *instituti* make up the twelve *unciae*, how much did they take to whom nothing was assigned?

§ 6. A. The half (*dimidia*). For as it cannot be supposed that the testator would appoint a *hæres* and give him nothing, we must assume that the *hæreditas* was first to be divided into two *asses*, of which one was to be distributed amongst those *instituti* whose shares were assigned by the testament, whilst the other was to be distributed amongst those *instituti* to whom no shares were so assigned; in short, the *as* was divided into twenty-four instead of twelve *unciae*. If the testator distributed twenty-four *unciae*, but some of the *instituti* have no share assigned to them, the *as* must be divided into thirty-six *unciae*, and so on (1). But if the shares assigned do not exactly make up twelve, or twenty-four, or thirty-six shares, &c., then the *instituti*, to whom no share has been assigned, take such shares as will make up the *dupondius*, the *tripondius*, &c. (§ 8).

Q. How may the appointment of a *hæres* be modified in its terms?

§ 9. A. It may be absolute or conditional, but it cannot be made to take effect after (*ex*) or up to (*ad*) a fixed period; for if a testator appoint a *hæres* for one period, and none for another, he must die partly testate and partly intestate—a privilege confined to soldiers: moreover, the maxim of law is, once an *hæres* always an *hæres* (*semel hæres, semper hæres*).

Q. Was an *institutio*, therefore, void when made for a fixed period?

(1) *Hæreditas*, divided into two *asses*, each equal to twelve *unciae*, is called *dupondius*; into three *asses* *tripondius*, &c.

§ 9. *A.* No. From the importance attached by the Romans to not dying intestate, it was presumed that the chief object of any testator must be to have a valid testament, and that, whether made in this or that form, must be a matter of indifference. Therefore an *institutio* made for a fixed period was construed as absolute in its terms, such period being disregarded as surplusage.

Q. How does a fixed period differ from a condition?

A. The fixed period postpones the vesting of the testamentary gift, without diminishing the certainty of its ultimately vesting; whereas a *condition* makes the bequest itself uncertain, by making it depend on some future event, which may or may not happen (1).

Q. Are not conditions sometimes held void?

§ 10. *A.* Yes: if physically impossible. *e. g.*, that you shall touch the sky with your finger; or if morally impossible, as violating law and morality. When the *institutio* was subject to such conditions, it was construed as absolute in its terms: the only reason for this being the importance which the Romans attached to a testament.

Q. If the vesting of the *hereditas* may be postponed for an indefinite period, viz., till the fulfilment of a condition on which the vesting depends, why may it not be equally postponed for a definite period, viz., till the term fixed for the vesting has arrived?

A. It has been thought that this difference arises from the retrospective effect attached to a condition when fulfilled, an effect which is not attached to the fixed period

(1) An event which must happen at some time may constitute a condition, viz., when it is uncertain whether it will happen during the life of the person who is to be benefited when it does happen. Hence *dies incertus conditionem in testamento facit*, a maxim, however, not applicable to contracts. Thus, an *institutio heredis*, conditional on the death of a third party, is a conditional appointment, because the death of this third party, though it must happen some time or other, may happen before or after the death of the *institutus*. Conditions are *potestativæ*, dependant on the act of the *institutus*; *casual*, dependant on chance, or on the act of another; and *mixed*, dependant both on the act of the *institutus* and on chance or on the act of another. Conditions *potestativæ*, though not yet fulfilled in terms, are held to be fulfilled substantially when fulfilment by the *institutus* has become impossible. But the case of a *mixed* condition is different; *e. g.*, that of marrying a particular woman; for if she refuses, the condition must be considered as fulfilled, but it is otherwise if she dies.

when it arrives. No doubt the effect in question exists in case of obligations: but we have no authority to extend the doctrine to testamentary dispositions; for the time when the rights of a *hæres* conditionally appointed vests, is the time when the condition is fulfilled: till then, the *hæreditas* itself, and not the *institutus*, continues and represents the person of the deceased (1).

Hence (and this is conclusive on the point), when the *institutus* dies before the condition has been fulfilled, his appointment is void, which it would not be if the condition took effect from the day of the testator's death; for then the *institutus* would succeed to the *hæreditas*, and it would be transmitted to his own *hæredes*. The true answer to the question is probably this: when the appointment is conditional, the succession of the *hæres legitimus* (i. e., designated by law) is set aside or suspended, so long as the condition may possibly be fulfilled, because there is a possibility every moment that the *institutus* may acquire the right to come in, since he has an expectation of succeeding at a period more or less remote, indefinite though it be, and since, from the favour shown to testaments, such expectation is a sufficient ground for excluding the *hæredes legitimi* (i. e., *ab intestato*) until the condition has utterly failed. But if an *institutio hæredes* which is made to take effect only until (*ad*) or after (*ex*) a fixed time were held good, there would be a fixed period, during which it is absolutely certain that there can be no *institutus*. During this period, therefore, it is clear that there is an intestacy, and that the deceased has died partly testate and partly intestate, which is a violation of first principles (2). To avoid this result, therefore, the condition attached to the

(1) But still the *hæres*, when he has accepted the *hæreditas*, is in some respects in the same position as if he had succeeded the very moment the testator died. *Hæres quandoque adveniens hæreditatem, jam tunc à morte successisse defuncto intelligitur*. But this is always the effect of accepting an *hæreditas*, whether bequeathed absolutely or conditionally. Therefore it is not the peculiar effect of the fulfilment of the condition.

(2) Hence, when a soldier, who by privilege might appoint a *hæres* for a fixed period, and die partly testate and partly intestate, nominated a *hæres*, e. g., for ten years (*ad certum tempus*), the *hæreditas* passed, on the expiration thereof, to the legal *hæredes*; but if his *institutus* was to succeed ten years after testator's death (*ex certo tempore*) the *hæreditas* till that period descended *ab intestato* to the *hæredes legitimi*, i. e., designated by law.

appointment is expunged, and it is construed as an absolute appointment.

Q. When the institutio was subjected to a number of conditions, was it necessary that every one of them should be fulfilled?

§ 11. A. If they were imposed jointly (e. g., if you do such and such a thing) all must be fulfilled: but if they were in the disjunctive form (e. g., if you do such or such a thing), it was enough if one was fulfilled. But observe, this is a mere rule of construction, which must always yield to the testator's intention: the will of the deceased, rather than the literal meaning of the words, is the thing to be considered.

TITLE XV.—OF SUBSTITUTIO VULGARIS.

Q. Define *substitutio* generally.

A. It is an appointment of a *heres*, subject to another appointment, on which it depends.

Q. How many kinds of *substitutiones* are there?

A. Three: 1. *vulgaris*; 2. *pupillaris*; 3. *exemplaris*, or *quasi-pupillaris*.

Q. Define *substitutio vulgaris*.

Pr. A. It is that disposition by which a testator, who has appointed a series of *heredes*, calls to the *hereditas* the *heres* second in order, in case the first does not assume the *hereditas* (*si heres non erit*): the third, in case the second does not, and so on (1). Those instituti who come first in the series, are the *heredes* proper: those who come second or third, are the *substituti*.

Q. What form of testament was adopted, when the testator wished to be certain of having a *heres*?

Pr. A. He put his slave last on the list of instituti (2), who would thus become *heres necessarius*. And the reason for taking this precaution was to avoid the possibility of dying intestate.

Q. Might *substitutus* come in along with *institutus*?

§ 4. A. No: when the *institutus* assumed the *hereditas*,

(1) Example: *Let my son be my heres; if my son is not my heres, let Sempronius; if he is not, let Mævius*. The order in which the *heredes* succeed is determined by looking to the testator's intention as expressed in his will.

(2) The slave might come in higher in this list; but if the testator was insolvent, the slave succeeded to the *hereditas* last, even though appointed first.

the *substitutio* was null, as the condition on which it depended had failed. But Tiberius decreed that when a testator instituted a slave, believing him to be a freeman, with a *substitutus* to succeed him, the *substitutus* should come in with such slave (1).

Q. How many modes of *substitutio* were there?

§ 1. A. You might substitute several persons for one, or one for several, or a different person for each of the *instituti*: or the *instituti* might be substituted for each other (*ipsi invicem*).

Q. What followed when the *instituti* were substituted for each other?

A. The share of the *institutus* who failed, went to those *instituti* who became *hæredes* of the testator and were still living: to the exclusion of the *hæredes* of an *institutus* who had died after accepting the *hæreditas*, but before the title of the *substituti* vested. In this respect there was a difference between the case where the *instituti* were substituted for each other, and the case where the *jus accrescendi* applied, for it increased not merely the share of the surviving *hæredes*, but also the share accepted by a deceased *hæres*, and transmitted to his successors.

Q. When the *instituti* were substituted for each other, but the testator had not defined the mode in which the vacant share was to be divided amongst these *instituti*, how was it in fact divided amongst them, when their shares were unequal?

§ 2. A. It was divided in proportion to each of their shares under the testament, thus: Suppose a testator has appointed three *hæredes*, *Primus* for two unciae, *Secundus* for seven, *Tertius* for three, and has made each the *substitutus* of the other. *Tertius* dies, or refuses to accept the *hæreditas*: his share will be divided into nine parts, two of which will go to *Primus*, and seven to *Secundus*. For it is presumed that the shares given expressly by the *institutio* are repeated by implication in the *substitutio*.

Q. When B., the second of two *instituti*, was substituted for the first, A., and a third person, not *institutus*, C., was substituted for B., was C. thereby substituted for A.?

(1) *In partem admittitur* (§ 4), i. e. for a half, probably. The difficulty here was whether the condition (*si hæres non erit*) on which the *substitutio* depended had been fulfilled when the slave was his *hæres*, not for himself, but for his master.

§ 3. *A.* Yes (1): *C.*, who was substituted for *B.*, who again was substituted for *A.*, was impliedly substituted for *A.* Hence the rule—*substitutus substituto censetur substitutus instituto.*

Q. But would not the *jus accrescendi* have produced the same result?

A. *C.*, the substitute of *B.*, by taking *B.*'s share, was entitled, by the *jus accrescendi*, to the vacant share of *A.* But prior to Justinian the *jus accrescendi* was restricted by the *caducary* laws (the *lex papia poppæa*), which conferred either upon the *hæres* or children, or upon the public treasury, the shares *caducæ* or *quasi-caducæ*, i. e., all that had become *vacant*, either before the testator's death, or between that and the opening of the testament (*vide tit. Legacies*). Now, *substitutio* prevented a bequest becoming *caducum*. Moreover, even after Justinian's time there was an advantage attached to *substitutio*, viz., in case there were three *instituti*: thus, when for the first you substitute the second, and for the second a fourth, *non-institutus*, such fourth, in case the two first *instituti* failed, received together with the share of the second, the whole of the first: whereas, had there been no implied *substitutio*, the share of the first, when *vacant*, must have been divided by the *jus accrescendi*, between the third *institutus* and the fourth, viz., the *substitutus* of the second (2).

TITLE XVI.—OF THE SUBSTITUTIO PUPILLARIS.

Q. Define the *substitutio pupillaris*.

Pr. A. It is the appointment of an *hæres* made by a father for the son under his power (3), in case the son should die a *pupillus*. For as no *impubes* could make a will, and to prevent intestacies, a custom was introduced allowing a *pater-f.* to make a will for those children,

(1) § 3. *Sine distinctione*, i. e., no difference was made in consequence of one substitution preceding the other; nor does it matter whether *A.* or *B.* is the first to die or to refuse to accept the *hæreditas*. Such distinctions were abolished by Severus and Antoninus.

(2) Shortly: *A.*, *B.*, *C.*, *instituti*; *D.* *non-institutus*: *B.* for *A.*, *D.* for *B.* substituted: then by *substitutio* *D.* takes the share of *A.* and of *B.*; by the *jus accrescendi* *D.* takes the share of *B.* and half the share of *A.*, *C.* taking the other half.

(3) At the time when the father makes the *substitutio*, or dies.

who, at his death, would be *pupilli*, i. e., *sui juris*, and *impuberes* (1). But no pater-f. had this privilege unless he himself had a testament (§ 5) or was a soldier.

Q. The *substitutio pupillaris*, then, presupposed two testaments?

§ 2. A. Yes: the father's and the son's, or at least a double testament operating on two subject-matters, since it disposed of two *hereditates*. If, however, the father used one instrument for himself and another for his son, the father's will was required to precede the son's, but when he used only one instrument for both, no order was prescribed.

Q. Was it only to children in the first degree that a pater-f. might appoint a *substitutus*?

§ 4. A. He might do so for the more remote issue, provided that on his death they would be *sui juris*. Moreover, he might do so for posthumous children.

Q. What precaution might be taken by a pater-f. who apprehended danger to his son by publicly nominating a *substitutus* for him, whose interest it would be that the son should die a *pupillus*?

§ 3. A. He might leave open the first part of the will, disposing of his own *hereditas*, and tie or seal up the other part, nominating the *substitutus*, desiring at the same time that the seals should not be broken before the death or full age of the *pupillus*.

Q. Was a pater-f. bound to institute the *filius-f.* for whom he appointed a *substitutus pupillaris*?

§ 4. A. No: he might appoint such a *substitutus* for his issue, whether he instituted or disinherited them. When the son was appointed *hæres*, his *substitutus pupillaris* was regarded as a *substitutus vulgaris*; and *vice versâ*, the *substitutus vulgaris* as his *substitutus pupillaris*, unless the testator expressed a different intention.

Q. What goods devolved upon the *substitutus pupillaris*?

§ 4. A. All the goods vested in the *pupillus* by succession, gift, or otherwise. But if the *father-adrogator* made the substitution, it affected no goods but those received from or through him. The other goods of the *adrogatus* went to his legal successor or to the *substitutus* appointed by his natural father.

(1) The *pater-familias* may appoint a *substitutus pupillaris*, whenever he may nominate a testamentary tutor (B. 1, t. 13).

Q. Might the father appoint a *substitutus pupillaris* for each of his children?

§ 6. A. Yes: and he might also appoint one for the last which should die a pupil. In the first case no child died intestate; in the second the order of legal succession was retained; and the child who died last a pupil was the only one which had a testamentary hæres.

Q. What was the form of appointing *substituti*?

Pr. § 7. A. They might be named, e. g., *Titius, be my son's hæres*: or, generally, *Whoever shall be my hæres shall be my son's hæres*. In this last case the *hæreditas* of the pupil passed to those *instituti* of the father, who became in fact *hæredes*: it passed to them, however, not in equal shares, as it would have done if they had been individually named *substituti*, but according to the proportion of their shares in the father's *hæreditas* (1).

Q. How was a *substitutio pupillaris* ended?

§ 8. A. 1. By the pupil reaching puberty; for he could then make a testament for himself. 2. When the father's testament was annulled; for the *substitutio pupillaris* was incident to it. 3. When the child died before the father; for then the right to make a will had never vested in it. 4. By any *diminutio capitis* suffered by the pupil, either before or after the testator's death; because, in the first case, the testator was divested of the father's power; and, in the second case, the pupil must either have ceased to be a citizen or to be *sui juris*, and therefore to have the right to make a will (2).

Q. If a stranger or a son of full age was instituted by a testator, could he provide for the case of these parties becoming *hæredes*, and then dying within a certain period,

(1) If a slave, instituted by a father, and substituted for the son, became free after acquiring for his master the father's *hæreditas*, but before the son's death under age, such slave, and not his former master, was the *substitutus*: for the benefit of the *substitutio* was personal.

(2) Observe, however, that in case the *pupillus* was *adrogatus*, and died under age, his goods were to be given back to those who would have had them if there had been no *adrogatio*, and consequently to the *substitutus* of the pupil appointed by his natural father. But then it was not directly by virtue of the substitution that the substitute sued, but *utiliter* by virtue of the *stipulatio*, by which the *adrogator* was bound to restore the goods of the *adrogatus* (p. 33).

by means of a substitution, putting other parties in their place as *hæredes*?

§ 9. *A.* No: the testator could only bind, by *fideicommissum* (trust), the stranger or the son of full age to give the whole or part of his *hæreditas* to a third party. But there was this great difference between an institution by means of a trust and the *substitutio pupillaris*; in the former the testator disposed not of the *hæreditas* of the *institutus*, but of his own *hæreditas*, and therefore the proposed transferee of the *hæreditas* not being the *hæres* of the trustee, succeeded to none of his goods, and received nothing more from him than he had received from the testator.

Q. Might not a testament be made for certain *pubes*?

§ 1. *A.* Yes: Justinian allowed ancestors of lunatics (*pubes*) to appoint *substituti*, who should succeed them if they died before recovering their reason. This was the *substitutio exemplaris* or *quasi-pupillaris*.

Q. How did *substitutio pupillaris* differ from *substitutio exemplaris*?

§ 1. *A.* 1. The *substitutio exemplaris* might be made by the pater-f. or by any ancestor in the male or female line. 2. In the *substitutio exemplaris* the *substituti* must be selected from certain persons (*certas personas*, § 1), i. e., from the children of the lunatic; and, in default thereof, from his brothers; so that the right of selection was not absolute, as in the *substitutio pupillaris*.

TITLE XVII.—HOW TESTAMENTS ARE AVOIDED.

Q. If a testament has been made with the required solemnity (t. 10), by one who had the right and the power to make it (t. 12); and if the *sui hæredes* (t. 13) have not been omitted and a fit *hæres* (t. 14) has been instituted, did such a testament always take effect?

Pr. A. No: it was valid in its creation (*jure factum*); but it might be avoided (*rumpatur*), or become ineffectual (*irritum*).

Q. Are not the words *illegal* (*injustum*), *ruptum*, and *irritum* used synonymously?

§ 5. *A.* Sometimes; but as it is always better to distinguish each thing by its own name (§ 5), a testament is *injustum* when void in its creation; *ruptum* when it is valid in its creation, but afterwards avoided through some

cause unconnected with the status and capacity of the testator; *irritum* when it is avoided by some change occurring in the status and rights of the testator (§ 4).

Q. How is a testament *ruptum*?

§ 1. A. 1. By the unexpected addition or birth of any *hæres* who has not been instituted or legally disinherited (1). 2. By a subsequent testament, capable of giving a new *hæres* to the testator. 3. By the testator legally revoking one testament without making another.

Q. Why do you say that the testament was *ruptum* by a subsequent testament, *capable of giving a hæres to the testator*? (§ 1).

§ 2. A. Because, if the second testament was regularly made (*jure facto*), and valid in its creation, it avoided the first. If, therefore, causes arising after the date of the second testament made it ineffectual: if, e. g., the *hæres* appointed by it refused, or died before the testator; or if the condition on which his appointment as *hæres* depended, was not fulfilled, the *pater-f.* in all such cases died intestate, for his first testament ceased the moment the second came into existence, and the second supplied no *hæres*.

Q. Did the second testament destroy the first without express revocation?

A. Yes: a person could not die with two testaments, because each must contain the appointment of a *hæres*; but that disposed of the whole rights of a person, and therefore could no more be made twice, than the same thing can be given twice. Now, as the intention of a testator might vary until he died, of two testaments, the later in date must destroy the other.

Q. What if the second testament expressly confirmed the first?

§ 3. A. Since it was impossible for the same person to have two testaments, the first was held to be extinguished. But in order to give the testator's will as much effect as possible, the first testament was held to be a codicil (t. 25), and the confirmation in the second was construed as a trust, bind-

(1) T. 13, *ante*. Observe that the *breaking* of the testament, by a child being adopted into the family, could not be prevented by an *exheredatio*, unless the child had been originally emancipated by his adopter, so that he was only returning to his original family; but such *breaking* might be prevented by instituting him, for though you could not take from a stranger the title of *hæres*, you might bestow it on him by testament.

ing the *hæres* to restore the *hereditas* to those *instituti* under the first, *minus* the fourth, which every *hæres* charged with a trust is entitled to by the extended operation of the Falcidian Law (t. 23).

Q. Was the first testament invalidated, when by the second the *institutio* was confined to a particular article (*ex certis rebus*)?

§ 3. A. Yes: because it was a rule to disregard that part of an institution which confined it to a particular article.

Q. Did a second testament, if imperfect, revoke the first?

§ 7. A. No: because though it certainly indicated a change of intention, still that was not enough to destroy an institution: there must be a legal revocation (1).

Q. How might a testator revoke his testament without making a second?

A. By tearing it up, or otherwise destroying it with the intention of dying intestate; or by declaring his change of will publicly, or before three witnesses. Such declaration, however, did not instantly revoke the testament, for the testament was required to be ten years old.

Q. When was a testament ineffectual (*irritum*)?

§ 4. A. When the testator suffered a *diminutio capitis*.

Q. If the testator regained his original status before his death, did the testament revive?

§ 6. A. Not by the civil law (2); but if the testament was then sealed by seven witnesses, the prætor granted to those instituted thereby the possession of goods *secundum*

(1) The senate decreed this on the proposal of Pertinax. In the same Sc. he declared—1. That he would not accept an *hereditas* if it was given (*litis causa*) from hatred to those with whom the testator had had disputes, in order that they might have a powerful adversary to contend with. 2. That he would not validate testaments to which he had been instituted, because they were null. 3. That he would not be *hæres* if that office had been conferred upon him by mere word of mouth (*ex nuda voce*), or even by writing, unless in the proper form. For, said the emperor, though we are above the laws, we put ourselves willingly under them.

(2) For the testator who changed his status lost his original person, his former *patrimonium*. If he again became *sui juris* he had a new person, a new *patrimonium*, to which his former testament did not strictly apply. As to *Postliminium*, B. 2, t. 12; as to soldiers, B. 2, t. 11.

tabulas, provided the testator had the *testamenti-factio*, both when it was made and when he died, without regard to the intervening period (p. 134).

TITLE XVIII.—OF AN INOFFICIOUS TESTAMENT.

Q. What is a *testamentum inofficiosum*?

Pr. A. An act is *inofficiosum* which violates any *officium* or duty arising out of affection, blood, or gratitude. Hence, a testament was *inofficiosum* which, though made in legal form, violated natural duty.

Q. How might children prevent an inofficious testament from depriving them of that *hereditas* to which natural affection would have called them?

Pr. A. To prevent testators from abusing that absolute power of selecting *heredes* which the Twelve Tables allowed, the *prudentes* held that the *pater-f.* who disinherited, and every other ancestor who omitted, without lawful cause, their issue, must be insane, and, under that pretext (*hoc colore*), they introduced the plaint or action of *testamentum inofficiosum*, by which children might claim the *hereditas* against the *instituti* (1), and thus set aside the testament in question.

Q. Why do you say *under this pretext*?

Pr. A. Because it was only a means of avoiding a valid testament; for had there been actual imbecility, the testament would have been void *ab initio*.

Q. To whom was the plaint of *inofficiositas* open?

§ 1. A. It was open to none, except those who would have succeeded, and according to the same order in which they would have succeeded had there been no testament; for they alone had an interest in avoiding it. But, again, it was not open to all of them; it was, certainly, open to all the issue, whether subject or not to the testator, whether natural or adopted (2); but in default of children, it was open to ancestors alone, and, in default of them, to brothers and sisters.

(1) The plaint of *inofficiositas* is therefore an action by which a man claims to be admitted as *heres* (*legitimus*). It was brought before the *centumvirs*, as were all actions of *petitio hereditatis*. The action was also allowed against the *fidei-commissarii* and other possessors.

(2) Excepting, after the time of Justinian, the *filius-familias* adopted by a stranger.

Q. Was it open to all the brothers and sisters of the testator?

A. At first only to his brothers and sisters *agnati*; which excluded not merely uterine brothers, but also brothers and sisters *consanguinei*, not being *agnati*. Justinian allowed it to all the brothers *consanguinei*, without distinction: it was not till after Nov. 118, which abolished all distinction between relations through the father and those through the mother, that the *uterini* might prefer this claim.

Q. Did this claim lie against every *institutus*?

§ 1. A. Yes, at the suit of the testator's lineal kindred; but it could not be preferred by brothers and sisters, except against *instituti turpes* (dishonourable).

Q. Was this claim allowed if the party preferring it had any other means of obtaining the whole or part of the succession?

§ 2. A. No; for it was an extraordinary remedy. Hence it was not open to the pupil *adrogatus* who was afterwards disinherited by the *adrogator*, because the *Antoninian quarter* (B. 1, t. 11) was secured to him in such a case: nor to the emancipated son omitted from his father's testament, because he had the possession of the goods *contra tabulas* (p. 133).

Q. Prior to Justinian's time, was not a testament sometimes objected to as inofficious, by a person himself instituted by it?

§ 3. A. Yes: such person objected if he was not instituted to a fourth of what he would have had *ab intestato*; unless the testator had expressly directed that the fourth should be made up, in which case he was entitled to a personal action for the fraction by which the fourth was deficient (1). But, on the other hand, no claim could be preferred by the *institutus*, if he had received from the testator his fourth, though not as *hæres*; e. g., as *legatee*.

Q. What alteration was made by Justinian?

§ 3. A. Out of regard (§ 6) for the testator, he decreed that if a man received anything as *hæres* or *legatee*, by way of *fidei-commissum*, or donation *mortis causâ*, he should

(1) An action to make up the proper sum (*usque ad quantum legitima partis repleatur*) is a personal action, permanent and assignable to the *hæres*, and does not avoid the testament. The claim of *inofficiositas* is a real action (a kind of *petitio hereditatis*), not assignable to *hæres*, and by virtue of which, if brought within five years, a testament is rescinded.

not be allowed this plaint, but should have an action to make up the fourth, even though the testator had not expressly directed it to be made up.

Q. How is this deficient fraction of the fourth supplied?

§ 3. *A.* *Boni viri arbitratu*, i. e., according to the valuation of the goods made by a person of acknowledged fairness; and this fraction must make up the fourth of that portion of the *hereditas* which the party in question would have received had there been an intestacy (1). This fourth was called the *portio legitima*, or simply *legitima*: he who claimed it was a *legitimarius*.

Q. Was anything given *inter vivos* reckoned as part of the *legitima quarta*?

§ 6. *A.* Not in general, except indeed in certain cases defined by a Constitution referred to (§ 6). The grounds of the general rule are obvious; a party was entitled to the plaint in question, unless he had received the fourth of that which he would have received had there been no testament. Now goods given away *inter vivos* formed no part of the *successio* of the deceased; therefore they could not be included amongst those to which the *heredes legitimi*, as such, laid claim.

Q. How did the right to a plaint *de inofficioso* cease?

A. This action being founded upon a kind of injury alleged by the *legitimarius* against the testator, who has disinherited or omitted them from his will, was extinguished in the same manner as other actions for injuries (B. 4, t. 12). 1. If the *legitimarius* died without having shown any intention to urge his claim. 2. If he allowed so much time to elapse that a tacit abandonment of the claim might be presumed: this period was originally two, and afterwards five years. 3. If he directly or indirectly sanctioned the testament; e. g., by contracting with the *heredes instituti*, as such, or by claiming voluntarily as an advocate or a *mandatarius*, as against the *heredes instituti*, the execution of a legacy.

Q. Was the plaint *de inofficioso* denied to a tutor because, by his father's will, which disinherited him, he received a legacy for his pupil?

(1) The several fourths, in reference to the testator, make together a sum equal to the fourth of all his goods, which is to be divided amongst the *legitimarii*, however many; the share of each being proportionate to what each would have taken, if the whole *hereditas legitima* had passed to them (§ 6).

§ 4. *A.* No: the tutor might still have the plaint on his own behalf, because, unlike the advocate and the mandatarius, he was compelled to claim and receive his pupil's legacy.

Q. What was the penalty if a man preferred an unfounded plaint?

§ 5. *A.* He lost whatever the testator left him.

Q. If a tutor as such preferred this plaint on behalf of his pupil, did he lose any legacy bequeathed to him?

A. No: though the plaint failed, the tutor might claim his own legacy. He was not to be punished for what he did in pursuance of what he believed to be his duty.

APPENDIX.

Q. After the publication of the Institutes, what alterations did Justinian make on this subject?

A. He raised the *legitima* to half of the *successio*, when the children exceeded four, and to a third when they did not (Nov. 18, c. 1). Afterwards it was decreed (Nov. 115, c. 3) that the *legitima* must be left to the children and descendants as *heredes*, and that they must be always *instituti*, if only for a specific thing, which, if insufficient, might be made up to the proper amount by an action for the deficiency: and Justinian defined fourteen causes, hitherto undefined, in which a testator would be justified in disinheriting or in omitting his descendants or ancestors; and he required such causes to be expressed in the testament, and that the burden of proving them should be on the *institutus*. Failing these conditions, the testament might be rescinded (1), not absolutely, but so far as the *institutio heredis* went, the legacies and other dispositions remaining valid.

TITLE XIX.—OF THE KINDS OF HEREDES AND THE DIFFERENCE BETWEEN THEM.

Q. How many kinds of *heredes instituti* were there?

Pr. A. Three: 1. *Necessarii*; 2. *Sui et necessarii*; 3. *Extranei*.

Q. Define the *heredes necessarii*.

§ 1. *A.* They were slaves instituted by their master, on whom the testament conferred at once liberty and the

(1) Provided the rescission was demanded within the proper time, and according to proper form.

hæreditas (1). They were called *necessarii*, because they became *hæredes* whether they would or not. They did not accept the *hæreditas*, but it vested in them immediately, on the testator's death, if the institution was absolute, and on the condition happening if it was conditional.

Q. Were the *hæredes* then liable, against their will, to be sued by the creditors of the deceased?

§ 1. A. Yes (p. 17): the *hæres* was liable to all the debts of the deceased, even out of his personal goods. But the prætor relaxed the strictness of the civil law, and granted the benefit of *separation of goods* to the *hæres necessarius*, who claimed it before meddling with the goods of the *hæreditas*. By this means the creditors were confined to the goods of the *successio*, and the *hæres necessarius* kept his own property free, including even what was due to him by the deceased (2).

Q. Who were *sui et necessarii hæredes*?

§ 2. A. Those who at the death were subject to the power of the person whom they succeeded, either *ab intestato* or by a testamentary appointment.—They are called *sui* because the *fili-f.*, immediately under the power of the *pater-f.*, were considered during his life as joint-proprietors of the goods of the family (*vivo quoque patre Domini existimantur*, § 2); so that, on becoming *hæredes* of the *pater-f.*, they succeeded to their own goods, and thus became *their own hæredes* or *hæredes* in their own right (*sui hæredes*) (3). They are called *necessarii*, because the de-

(1) For this purpose it was necessary that the slave should belong to the testator, both when the testament was made and when the *hæreditas* vested (§ 4). It mattered not what became of him between these two periods (p. 137). When the slave was instituted conditionally, and enfranchised absolutely, his liberty was suspended until the condition was fulfilled, in order that the slave receiving liberty and the *hæreditas* at once, might be *hæres necessarius*. So, from the same desire to favour the testator when the institution was absolute, and the enfranchisement conditional, the former was suspended until the slave acquired his liberty.

(2) The *separatio* was also granted to the creditors of a *hæreditas*; for where the *hæres* was insolvent, it was important to separate the goods of the deceased from those of the *hæres*.

(3) This is the view of Ortolan, and it is supported by a passage from Gaius (2, § 157). The other interpretation, adopted by Ducaurroy and Sandars (p. 312), refers the origin of the term to the common usage of *suus* as a person in the power of the *pater-f.* The *sui hæredes* were those who united the characters of *sui*, *i. e.*,

ceased by his power compelled them like slaves to become *hæredes* without exercising any choice. Such at least was the civil law.

Q. Was it so by the prætorian law?

§ 2. A. No: the prætor did not regard the children as *hæredes* until they meddled with the goods of the deceased; till then he refused to the creditors of the *hæreditas* any action against the *sui hæredes* who abstained.

Q. How did the benefit of *abstaining* differ from the *separation of goods* granted to the slave?

§ 2. A. The *separation of goods* had to be claimed by the instituted *hæres*; nor did that prevent his being liable to the creditors of the *hæreditas*, so far as the goods left by the patron went; whereas the *beneficium abstinendi* absolutely protected the *sui hæres*, who abandoned the *hæreditas* of the *pater-f.*, without the necessity for his claiming such privilege, and by the mere fact of not meddling, after puberty, with the *hæreditas* (1).

Q. Who were the *extranei* or *stranger hæredes*?

§ 3. A. Those not under the testator's power, *e. g.*, the testator's own children not being under his power, but instituted by his testament: so also children instituted by their mother, because women had no power over their children, or slaves instituted by their master, who had become free or subject to some other person's power before the passing of the *hæreditas* (p. 137).

Q. Did these *extranei* become *hæredes* involuntarily and by operation of law?

A. No: the *hæreditas* was proffered (*delata*) to them at the death of the testator, if the institution was absolute, and if it was conditional, on the happening of the condition; but it was *acquired* by them by an act of will: hence they were called voluntary *hæredes*.

Q. Were *extranei instituti* always capable of acquiring the *hæreditas*?

§ 4. A. No: it was necessary that the testator should have *testamenti factio* with them; *i. e.*, that they should be capable, if not of making a will, at least of accepting a benefit under another's testament, either on their own behalf or on behalf of their *pater-f.* or master (2).

in the power of the *pater-f.*, and *hæredes*, which no one could be unless he was *sui juris* at the *pater-f.*'s death.

(1) Though an impubes did interfere, he retained the *beneficium abstinendi*.

(2) This was the *passive*, as opposed to the *active testamenti-factio*, by which a man had power to make a will.

Q. At what periods must the testamenti-factio exist?

§ 4. *A.* 1. When the testament is made. 2. When the *hæreditas* is proffered; *i. e.*, at the testator's death, if institutio is absolute, and if it is conditional, on the condition being fulfilled. 3. When the *hæres* accepts the *hæreditas*.

Q. Was it necessary that the *hæres institutus* should retain the capacity to take the *hæreditas* between these three periods?

§ 4. *A.* If he lost it for a time between the first and second, it was of no consequence; but if he lost it between the second and third, his recovery thereof would not avail.

Q. How did *extranei substituti* acquire a *hæreditas*, which was proffered to them?

A. By an act of will, by showing an intention to acquire, either by words (*verbis*) or by acts (*re*). This was called doing the act of a *hæres*, or entering upon the *hæreditas* (*aditio*) (1).

Q. When was the intention to become *hæres* shown by acts?

§ 7. *A.* When the institutus acted as *hæres*, *i. e.*, as master of the dead man's goods (*veteres enim hæredes pro dominis appellabant*), as when he sold or let out part of the *hæreditas* (2).

Q. Could a deaf and dumb person accept an *hæreditas*?

§ 7. *A.* Yes: by manifesting his intention so to do by his acts; it was enough if he understood what he was doing.

Q. Might a *procurator* accept a *hæreditas* for another?

§ 7. *A.* As a general rule the *institutus* must accept in person. Hence no procurator, curator, tutor, pater-f. or master of the *hæres*, whether institutus or legitimus, could accept or enter upon a *hæreditas* (3). For the same reason the *institutus extraneus* who died before accepting the *hæreditas* did not transmit to his *hæredes* the right to acquire it (4).

(1) Strictly, *pro hærede gerere* applies to the intention evidenced by acts: *adire*, when the same is evidenced by words, *Aditio ire ad hæreditatem*.

(2) Observe that in every case the intention to be *hæres* is that which causes a man to acquire the *hæreditas*. Hence you might sell or let out a part of the *hæreditas* without becoming *hæres*, if the sale or letting took place by mistake or for temporary purposes.

(3) But there were exceptions; *e. g.*, a pater-f. might accept the *hæreditas* proffered to his filius-f., if absent or an *infans*; and the tutor might do the same if the pupil was an infant, p. 49.

(4) But by a Constitution of Theodosius, the descendants instituted

Q. Was it requisite that the party accepting should know the circumstances of the *hereditas* proffered to him?

§ 7. A. Yes; he must know whether the person he claimed to succeed was dead; whether the condition (if the institutio was conditional) had been fulfilled; and whether he succeeded *ab intestato*, or by force of the testament.

Q. Is it possible to acquire only part of a *hereditas*?

A. No: the *hereditas* must be accepted or refused as a whole; and if a man accepted part, he was taken to have accepted the whole (1). The acceptance could not be conditional or for a fixed time.

Q. Explain the effects of accepting a *hereditas*.

A. The *heres* on accepting was invested with all the rights of the deceased, and continued his legal person. He became proprietor of the goods of the *hereditas*, and of whatever accrued to it (2); moreover, he was liable to all charges on the *successio*, i. e., to the whole amount of them if he was the only *heres*, and in proportion to his share in the *hereditas*, in case there were *joint-heredes*, but the extent of liability was quite independent of the value of the *hereditas*.

Q. How might a *heres extraneus* renounce the *hereditas* proffered to him?

§ 7. A. By expressing his will to that effect. A *heres*, after refusing a *successio*, could not resume it unless he was under twenty-five, for then he might obtain from the prætor *restitutio in integrum*, or unless the *hereditas* had been proffered to him by another title; thus, a person after renouncing the *hereditas* as *institutus*, might accept it as *substitutus* or as *heres legitimus*.

Q. Might a person relinquish after accepting an *hereditas*?

by an ancestor, to whose power they were not subject, might, if they died before the opening of the testament, transmit to their posterity the share intended for them. Justinian decreed that persons dying during the year allowed for deliberation might transmit to all their *heredes* the right, proffered to them by testament or *ab intestato*, in the succession of a deceased ancestor.

(1) Even those portions, added to his own, in consequence of one of his *co-heredes* renouncing or becoming incapable. For each *heres* was called to the whole *hereditas*, and the division was the mere result of several *heredes* coming in together.

(2) In one sense, the *heres* succeeded at the moment of the death; but in another sense, the *hereditas* of the dead man represented him till the *aditio* (p. 142).

§§ 5, 6. *A.* No: unless he was under twenty-five. But Adrian allowed one above twenty-five to relinquish it if he discovered, after acceptance, a considerable amount of debt; and in later times Gordian extended the same privilege to all soldiers.

Q. Was any period fixed within which the *hæreditas* must be accepted or renounced?

A. By the old law, unless the *institutio* was accompanied with *cretio* (1), the *institutus* might take as long as he pleased to decide. But on the demand of parties interested, *e. g.*, creditors, legatees, or *substituti*, the prætor limited the time allowed to the *hæres* for deliberation.

Q. What changes did Justinian introduce, by which *instituti* were relieved from claiming time for deliberation?

§ 6. *A.* *The benefit of the inventory* (C. vi. 30, 22), by which a *hæres* might accept the *hæreditas* without being liable beyond such charges as the goods of the *hæreditas* would cover, and without having his own goods mixed up with those of the deceased; for this purpose it was necessary, before meddling with the goods of the deceased, to have an inventory of them prepared within the time, and according to the form prescribed by the emperor. Justinian declared, that by this precaution any person might accept an *hæreditas* without hesitation. But it was still competent for a *hæres* to demand a period for deliberation: by taking that course, however, he could not have the *benefit of the inventory*; and hence, to protect himself from liability to the charges upon the *hæreditas*, he was obliged expressly to renounce it before the time for deliberation had expired, which was nine months when granted by the magistrates, and one year when granted by the emperor himself.

(1) That was when the testator had himself fixed a period within which the *institutus* must formally declare his intention to accept. If he did not make such declaration within the time fixed, he was excluded (Gaius, 2, § 164). The *cretio* was added to an *institutio*, in order to make the *hæres* accept within a certain period, and to prevent the *hæreditas* from continuing *uncertain* for an indefinite period. After the prætors had fixed a period for deliberation, *cretio* of course ceased; and it was expressly abolished by a Constitution of Arcadius, Honorius, and Theodosius (A. D. 407).

TITLE XX.—OF LEGACIES (1).

Q. What is a legacy?

§ 1. *A.* The ancients defined it a sort of gift left by testament to be discharged by the *hæres*. We say *sort of gift*, because a gift strictly implies the concurrence of two wills, donor's and donee's, whereas the legacy is good without the will or even the knowledge of the legatee: *left by testament*, because there is no legacy unless by testament, whereas a *fideicommissum* may be made without testament, by codicil: *to be discharged by the hæres*, because the hæres alone can be charged with a legacy, whereas a *fideicommissum* may be charged upon a legatee or a fidei commissary.—After Justinian allowed legacies like *fideicommissa* to be made by codicil (t. 25), a legacy may be defined to be a gift which a man makes by an act of last will of a particular thing out of his successio.

Q. How many kinds of legacy were there in ancient times?

§ 2. *A.* Four. 1. *per vindicationem*; 2. *per damnationem*; 3. *sinendi modo*; 4. *per præceptionem*. Every one of these had its own particular formalities.

Q. Define the legacy *per vindicationem*.

A. That which transferred the property in the thing bequeathed directly, without imposing any obligation upon the *hæres*: it was so called because it gave the legatee a right to the *vindicatio* or action in rem possessed by every proprietor. In it the testator did not address the hæres, but the legatee: *capito, sumito*; or he addressed no one: *do lego* (Gaius, 2, § 196).

Q. What might be bequeathed in this way?

A. Only such things as the testator owned when he made the testament, and when he died (2): for in such only could the property be transferred by testament. A legacy *per vindicationem* of any other description of thing

(1) Justinian, who is discussing the modes of acquisition *per universitatem*, having explained how the *hereditas* is transferred by testament, ought now properly to proceed to show how it is transferred *ab intestato*; but he now proceeds to legacies and *fideicommissa*—by which not *res universitatis* but *res singulares* are acquired—because they are the ordinary and most important incidents of testaments.

(2) By the Catonian rule (p. 163). In case of *res fungibiles* it was enough if the testator owned them at his death (Gaius, 2, 196).

was void, because the testator could not transfer, and the *hæres* was not charged to transfer the property therein.

Q. What was the nature and form of the legacy *per damnationem*?

A. It was that which bound the *hæres* to give or to do something. This was its form: *Hæres meus damnas esto dare; dato, facito, &c.* This command to the *hæres* did not directly transfer the property to the legatee: he could not, therefore, have *vindicatio*; but he had a personal action against the *hæres* to compel him to transfer the property in the bequest, or to do that which the testator directed (Gaius, 2, § 204).

Q. What might be bequeathed in this way?

A. Not only things belonging to the testator, but those belonging to the *hæres*, or to any other person: for although a testator could not alienate the things of another, he might impose on himself or on his *heredes* obligations in respect to them.

Q. What was the nature and form of the legacy *sinendi modo*?

A. It merely imposed on the *hæres* the passive obligation of allowing the thing bequeathed to be done or taken by the legatee. The testator said, *e. g.*—*Hæres meus damnas esto sinere Lucium Titium, Hominem Stichum sumere sibi que habere* (Gaius, 2, § 209). This did not directly transfer the property, and therefore gave no action in rem; but the legatee might acquire the property by taking possession of the bequest: he had a personal action against the *hæres*.

Q. What might be bequeathed in this form?

A. Only such things as belonged to the testator *himself* or to his *hæres*. The obligation thus imposed on a *hæres* to allow the legatee to take the thing of another, is merely an obligation to *suffer* something to be done.

Q. What was the nature and form of legacy *per præceptionem*?

A. By it the testator told the legatee not precisely to take the bequest, but to take it beforehand (*præcipito*).

Q. What was its effect, and to whom might it be made?

A. Opinions were divided. The Sabinians, adhering to the strict meaning of *præcipere*, to take before partition, held that the legacy was confined to the *institutum*; for they alone made partition, and therefore could take before partition; and hence the only action which the legatee had was the action for partition; viz., *familiæ erciscundæ* (B. 4, t. 17, § 4).

The Proculians, considering it unreasonable that the syllable *præ* should diminish the force of *capere*, held that any legacy *per præceptionem* to persons not *heredes* should be deemed to be the same as if made *per vindicationem*; and this opinion was sanctioned by a Constitution of Adrian (Gaius, 2, § 213).

Q. How did the differences between these various sorts of legacies cease?

§ 2. *A.* The Sc. *Neronianum* (A. D. 60) decreed that the legacy *per vindicationem*, if invalid, as such, by the old law (i. e., if a testator had bequeathed the thing belonging to another, or to his *heres*), should have the same effect as if it had been made *per damnationem*. Constantine abolished the necessity of using particular forms; but that did not prevent the distinction being still made between a legacy *per vindicationem*, including all dispositions in which the testator showed an intention to immediately transfer the property, and a legacy *per damnationem*, including all in which his intention was to impose an obligation on his *heres*. The differences in question, however, were absolutely abolished by Justinian; for he, desiring to give full effect to the intentions of testators, decreed that a legacy should be executed in any mode in which execution was possible, and that, without regard to the form of the disposition, the legatee should have the personal action formerly attached to a legacy *per damnationem*; and that if the thing belonged to the testator, the legatee should have the *vindicatio* formerly attached to the legacy *per vindicationem* or *per præceptionem*: finally, he allowed the legatees a right of *hypotheca* over all the goods of the deceased, and an action *in rem*, called *hypothecaria* or *quasi-serviana*, to enforce it (B. 4, t. 6, § 7).

§ 3. But he went further; for he abolished all distinction between legacies and *fidei-commissa* (1).

Q. What things, generally, might be bequeathed?

A. Only such as could be bought and sold (*in commercio*). But they might be in existence, or about to come into existence: they might be corporeal or incorporeal. Hence (§ 7), a person might bequeath the fruits to be produced from certain land, and the children to be born of a slave.

Q. Could the thing belonging to a third party be bequeathed.

§ 4. *A.* Yes: such legacy bound the *heres* to purchase

(1) For clearness these two subjects are treated separately.

it, and to give it to the legatee, or pay him its value, if the proprietor would not sell it (1). But in such case the testator must know that the thing bequeathed belongs to another; and the fact of knowledge must be proved by the legatee demandant. For the testator who bequeathed a thing whereof he supposed himself owner, would not perhaps have done so had he known that it belonged to a third party, since it is less burdensome for the hæres to give up a thing forming part of the *successio*, or his own goods, than to purchase the property of another.

Q. On the other hand, suppose the testator bequeathed that which he supposed to belong to another, but which in fact belonged to himself?

§ 11. A. Such legacy was valid; for the burden on the hæres was thereby diminished, and the testator's will not exceeded (2).

Q. If the thing bequeathed was subject to a hypotheca, was the hæres required to pay off the charge?

§ 5. A. Yes, if the testator knew of the hypotheca; if he did not, it might be exceeding his will to compel the hæres to pay it off. But this is a question of intention, and therefore a hypotheca would be a charge on the legatee, if the testator knew of it, and if it was his express intention that it should.

Q. Suppose something, already the legatee's property, bequeathed to him?

§ 10. A. Such legacy was void; for no man can acquire what is already his. Even though the thing ceased to belong to the legatee, the legacy was still void; for by the Catonian rule, dispositions which would not have been valid if the testator had died on the making of the testament, never became valid by his continuing alive (§ 32).

Q. What if the testator erroneously supposed that the thing bequeathed belonged to the legatee?

§ 11. A. The legacy was valid, because it was not impossible to carry it into effect.

(1) The thing so bequeathed must be *in commercio*, (§ 4), *e. g.*, the legacy of a public building would be void, and the hæres would not be bound to pay the value. For when the thing is *in commercio* the hæres may possibly purchase, and therefore the obligation is not impossible; but when the thing is not *in commercio* the hæres cannot purchase, and therefore the obligation is void.

(2) Here, *plus valet quod in veritate est quam quod in opinione* (§ 11); but in the last case, *plus est in opinione quam in veritate*.

Q. What if a testator bequeathed the property of another, and the legatee became proprietor thereof after the making of the testament (1)?

§ 6. A. The question would be, whether the legatee had acquired by a title importing clear gain, or by an *onerous* title: if by the former, as by gift, he could claim nothing, because the law was that *duæ causæ lucratiæ* do not concur in favour of the same person and in respect to the same thing; but if by the latter, *i. e.*, by having given money or money's worth, *e. g.*, by purchase, he was entitled to the price he had paid.

Q. What if the legatee received, not the thing bequeathed, but the value thereof by title importing clear gain?

§ 6. A. He might still demand the thing; for though the value of the thing was transferred already, that did not prevent the thing itself from being transferred.

Q. What demand on the hæres had the legatee of the land of a third party who had first bought the bare property, and afterwards, by extinction of the usufruct, acquired the absolute property therein?

§ 9. A. In strictness, such legatee might demand the land; but the judex would not condemn the hæres to pay more than the value of the land, *minus* the usufruct, for which the legatee had paid nothing.

Q. Why did the legatee claim the land and not the value thereof?

§ 9. A. Because he sued on the testament (*ex testamento*), and that bequeathed the land, not the value thereof; but as the judex could not direct the land to be transferred to the claimant, for he already had it, he condemned the hæres to pay an equivalent, *viz.*, the value of the land, *minus* the usufruct (B. 4, t. 6, § 31).

Q. But in demanding the land itself, did not a legatee claim more than was due to him; and was he not therefore guilty of *plus petitio*?

§ 9. A. No: because the usufruct is a mere servitude; and a demandant of land was supposed to claim the property *minus* the servitudes attached to it.

Q. Might a creditor bequeath to his debtor the debt he owes?

(1) The text says, *vivo testatore*, § 6; but it was the same when the acquisition was made after his death.

§ 13. *A.* Yes : to bequeath to a man what he owes is not to bequeath to him his own property ; for the subject-matter of a legacy of acquittance (*liberationis*) is not the property in the thing due, but the release from a liability, and from the right which may be enforced against the legatee, in respect to that which is due. Hence, a man might either bequeath the acquittance expressly, or he might bequeath to the debtor the thing due (*nomen*), or he might direct his *hæres* not to enforce the claim (1).

Q. Did the legacy of acquittance at once extinguish the debt?

§ 13. *A.* No : it only gave the legatee an action whereby to compel the *hæres* to release him by *acceptilatio* (B. 3, t. 29), and an *exceptio doli mali* to repel any claim of the *hæres* made before the *acceptilatio*.

Q. Could a debtor bequeath his *debitum* to his creditor?

§ 14. *A.* Such legacy was void, if it included nothing more than the debt, because the creditor got nothing by it. But if it involved any benefit, the legatee might claim it, and the legacy was valid (2). Thus, if a man bequeathed absolutely that which he owed at a certain date or on a certain condition, the legacy was valid, because it made the debt payable instantly (*propter representationem*).

Q. If a testator bequeathed that absolutely which was due at a fixed time or on a condition, did such legacy continue valid after the time had elapsed or the condition had been fulfilled in the testator's life? for thereby the advantage of the legacy over the original claim ceased.

§ 14. *A.* Papinian held (and his opinion was adopted) that the legacy was valid, because it was once good (*quia semel constitit*), and because the circumstances in question, though they would have stopped the legacy in its inception had they then existed, ought not to put an end to it after it has come into existence, because the legacy is still capable of being carried into effect.

Q. What if the husband bequeathed to his wife the *dos*?

§ 15. *A.* Such legacy (*dos prælegata*) was valid, because it gave her a real advantage, inasmuch as the *hæredes* of

(1) The testator, instead of an absolute acquittance, might direct his *hæres* not to demand the debt for a certain time; and then the exception would be only good for such time, § 13.

(2) After Justinian's time the legacy implied a charge (*hypotheca*) on the creditor's goods; and so it could seldom happen that the legacy would involve no benefit.

the husband could not set up against one claiming her *dos ex testamento*, i. e., as legatee, the same exceptions as were open when she sued *de dote*; e. g., exceptions claiming delay (1), or reimbursement for sums necessarily expended on her property (B. 4, t. 6).

Q. What if the husband had not received the *dos*?

§ 15. A. The legacy was void if the husband bequeathed the *dos* simply; but if it was mentioned not as itself the subject-matter of the legacy, but as descriptive of a specific thing, or of a sum otherwise sufficiently defined; e. g., if the testator bequeathed to his wife 500 solidi, or a particular house, *which he received as part of the dos*, the legacy was valid.—In general, when a man says: I bequeath to A. B. such a sum or such a thing, *which I owe him*, the subject-matter of the legacy is the sum or the thing, and not the debt; *which I owe him*, are words of description, which, though not true, do not invalidate the legacy.

Q. What if a testator bequeathed his claim upon a third party?

§ 21. A. Such legacy did not directly transfer the claim to the legatee, but it obliged the *heredes* to assign to him their actions against the debtor. I say *their actions* (*suas*), because all the rights of action of the deceased vested in the *heredes*, who were alone *juris successores*. Moreover, after such assignment the *heredes* were freed from all responsibility as to guaranteeing the payment of such claim, or as to the results of the action assigned.

Q. What if, in the case just put, the testator's claim has been extinguished, e. g., by payment to him during his life?

A. The legacy perished with the claim, just as it did when the thing bequeathed perished; so that the *heres* had no action to assign.

Q. Might not a legacy consist of an order given to the *heredes* to do or not to do some act, or to suffer an act to be done by the legatee?

§ 21. A. Yes: e. g., a testator might by legacy bind his *heredes* to repair the house of the legatee, or to pay his debts, and the legacy was valid if the thing was possible, and not contrary to the laws or *contra bonos mores*.

(1) Hence the *dos* (dowry) was said to be *prælegata*, given sooner (*præ*) than it would otherwise have been obtained.

Q. Besides *species* (specific things), could a testator bequeath *genera* (classes), as a horse, two slaves, without specifying them?

§ 23. A. Yes: the selection, unless the testator expressed a wish to the contrary, belonged to the legatee when it was to be made out of things of the same class, and part of the *hæreditas*: but when the selection was to be made out of things not within the *hæreditas*, since the legatee could not, by merely selecting a thing belonging to a third party, acquire the right to the property therein, and so to an action in rem for it, he was entitled only to a personal action, from which the *hæres*, being a mere debtor, would be entitled to discharge himself by giving one thing or the other, according to his choice (1).

Q. Was it the same to bequeath a class (*genus*) and to bequeath a choice (*optio*) of things of the same kind included in the succession?

§ 23. A. No: to bequeath a horse, a slave, generally, is to bequeath a corporeal thing, however undefined; but to bequeath the choice of a horse or of a slave out of those which I leave is the bequest of an incorporeal thing; *viz.*, the right to select; a personal right which can be exercised only by the legatee, so that by the old law such legacy of an *option* was a conditional one, and void if the legatee died before having exercised it. But the legacy of a *genus* being unconditional, passed to the *hæredes* of the legatee, though he outlived the testator, never so short a time.

Q. Did this distinction continue?

§ 23. A. No: Justinian decreed that the legatee who died before choosing might transmit to his *hæredes* the right to choose in his stead; and that if there were either several co-legatees or several *hæredes* of a single legatee who differed in opinion, the one to choose for all should be drawn by lot.

Q. Could a testator bequeath an *universitas*?

T. 23. § 5. A. Yes: he might bequeath a portion of the goods left by him (*pars bonorum*), or a portion of the succession (*pars hæreditatis*). This latter was called *partitio*, and the legatee *legatarius partiaris*.

(1) Observe, the choice is not unlimited: the legatee could not take the best thing, nor could he be compelled to take the worst. Notwithstanding this limitation, the legacy of an immoveable is regarded as uncertain and void, when, from the testator not having anything of the same nature with that bequeathed, the choice must be in the *hæres*.

Q. Was the legatee *partiarius* in the same position as a *hæres* appointed (*institutus*) to a portion of the goods?

A. No: for the legatee *partiarius* did not represent the person or succeed to the rights of action of the testator (*non est juris successor*); he succeeded only to his goods (*pars bonorum legata videtur*). Therefore he had nothing to do with the creditors or with the debtors of the deceased: they recognized only the *hæres*. Hence, when the *hæres* was to share the succession with the legatee, as it was just that the latter should derive no benefit till the debts were all paid, a *stipulatio* called *partis et pro parte* was made between them, by which they undertook to account for the sums received or paid by the *hæres* on account of the *hæreditas*, of which the legatee had to bear his part. Another difference was, that the *hæres* might avoid partitioning the *hæreditas* with the legatee, by delivering to him the value of the portion bequeathed.

Q. To whom might a bequest be made?

§ 24. A. To none except those with whom the testator had *testamenti-factio*. Now, with certain exceptions (1), a person had *testamenti-factio* with all Roman citizens and their slaves.

Q. Was there *testamenti-factio* with uncertain persons?

§ 25. A. Not by the old law, for nothing could be left to them either as a legacy or as a *fidei-commissum* (t. 23, *post*) (2), even though the testator was a soldier. Now, *incerti* are those of whom the testator has formed no definite idea. Thus, a legacy to *him who shall give his daughter in marriage to my son, or to the first person who shall be nominated consul*, was void, because made to an *incertus*. But a testator might make a bequest to those who were *incerti*, or unascertained, out of a specific number of persons (*sub certa demonstratione*); for instance, *who-soever of my relations now living shall marry my daughter*.

Q. After a legacy or *fidei-commissum* made in favour of

(1) *With certain exceptions*, by the *lex Voconia*, (B. C. 169), women could receive only a certain sum. By the laws *Julia* and *Papia Poppæa* (A.D. 9) persons unmarried till a certain age, persons married, but without children, could take only a portion of bequests made in their favour. Although these restrictions were abolished, the Christian emperors still held apostates and heretics incapable of being legatees.

(2) *Adrian* extended this prohibition to *fidei-commissa*. Liberty could not be left to an *incertus*, because the *Lex Fusia Caniniæ* decreed that slaves should be enfranchised by name.

an *incertus* had been paid by mistake, could it be recovered?

§ 25. *A.* No: the Christian emperors put an end to the difference which formerly existed on this matter between legacies and fideicommissa.

Q. What was the law as to *incerti* in Justinian's time?

§ 27. *A.* He allowed testators to appoint them hæredes, and to leave them legacies and fideicommissa; but he did not allow testators to appoint them testamentary tutors.

Q. Were posthumous children regarded as *incerti*?

§ 28. *A.* Yes: but long before Justinian's time the only postumi to whom legacies could not be given, and who could not be instituti were *postumi alieni*, i. e., those who, had they been born during the testator's life, would not have been subject to him or amongst his *sui hæredes*; e. g., a grandson conceived after the son's emancipation.

Q. But Justinian says (§ 28), that a testator might even before his time (*et ante poterat*) institute a *postumus alienus*.

A. This arises from confounding civil and prætorian law; for the prætor used to grant possession of goods *secundum tabulas* to any *postumus alienus* who was appointed hæres, though by the civil law such institutio was null. According to Justinian, however, it was declared to be valid by the civil law, so as to entitle the appointed hæres to the hæreditas. There was an exception, however, when the child was conceived by a woman *quæ uxor non esse potest*; i. e., who, though with child by a testator, could not have been his wife. It was not thought right that a testator should, by merely instituting, legitimize the fruit of an illicit connection.

Q. Was a legacy to the slave of the hæres valid?

§ 32. *A.* Opinions were divided (Gaius, 2, § 244), but ultimately it was held to be void if absolute (*pure*) in its terms, even although the slave-legatee had ceased to be subject to the hæres before the testator's death. For by the Catonian rule, all testamentary dispositions which would be null if the testator died the moment he made his testament, continued null notwithstanding his surviving. Now, in this case, if the testator had died the moment he made his will, the slave must have acquired the legacy for the hæres and for him alone, because slaves acquired for the master to whom they were subject when the legacy vested, which in case of an absolute legacy was the day of the testator's death; and so the same person would have

been at once legatee and hæres, which is impossible, for no man can be debtor to himself.

Q. What if the legacy to the slave of the hæres was conditional?

§ 32. A. It was valid if the slave was not subject to the hæres when the condition was fulfilled, for that was the vesting-time of a conditional legacy. The Catonian rule did not apply to conditional dispositions, or to any legacy vesting at any other time than the testator's death.

Q. Suppose a slave appointed hæres, and a legacy given to his master, is that legacy null?

§ 33. A. No: even though absolute in its terms (*etiam sine conditione*); but whenever the master acquires the hæreditas through his slave, such legacy becomes null, because a man cannot be debtor to himself. Till then, however, the legacy is valid, because the hæreditas may possibly be acquired by some other than the legatee, and then there would be nothing to prevent the legacy being carried into effect; for the hæreditas is acquired by the person to whom the institutus is subject when he accepts it, and by the order of whom he so accepts it; or it is acquired by the hæres institutus himself, if free at the time of such acceptance. Now, even supposing the testator's death to happen immediately after the date of his will, there must always elapse between such death, which is the vesting-time of an unconditional legacy, and the acceptance of the hæreditas, a certain period, during which the instituted slave may alter his status, and the status being altered, the hæreditas is acquired either for himself or for his new master, in which case the legatee would retain his legacy. But, on the other hand, a legacy given absolutely to the slave of a hæres institutus, must merge in the hæreditas; for the institutus sui juris becoming a legatee through his slave on the testator's death, must acquire the hæreditas for himself, and for no other.

Q. Was a legacy null if the testator made a mistake as to the *nomen*, *prænomen*, or *cognomen* of the legatee (1)?

(1) *Nomen* was the general name of the family, or *gens*: *cognomen* was the name of the branch or particular family to which a person belonged: *prænomen* was the name of the individual. To these was often added the *agnomen*, derived from some notable circumstance connected with the individual. Adopted children, whilst they assumed the various names of their new family, retained that of the old one. Thus, *Publius Cornelius Scipio*

§ 29. *A.* No. If there was no doubt as to the person intended to be designated legatee or hæres, a mistake in the name was of no consequence.

Q. Did the same rule apply to the misdescription of the subject-matter bequeathed?

§ 30. *A.* Yes: it was enough if the subject-matter of the legacy was ascertainable. Thus, if the testator said: *I bequeath the slave Stichus, which I bought of Seius*, the legacy was valid though the slave had been bought from another, provided it appeared which slave the testator intended (1).

Q. When a testator stated as a reason for giving a legacy something which had no existence in fact, was the legacy void?

§ 31. *A.* No: a wrong reason is even less important than a wrong description, because the reason of giving a legacy need neither be stated or known, whereas it was necessary to point out somehow the thing bequeathed, and the person to whom it was to go. Thus, if the testator said: *I give a legacy to Titius, for having conducted my business in my absence*, the legacy was valid, though the legatee had not managed the testator's business.

Q. Was the result the same if the reason was stated as a condition?

§ 31. *A.* No: the legacy was invalid unless the reason existed. If, therefore, the testator said: *I bequeath such a piece of land to Titius, if he has managed my business*, the legacy was void if Titius had not done so.

Q. *Quid*, if the reason alleged for giving the legacy was this, that it might be applied to a particular purpose; e. g., suppose a legacy given that the legatee might build a tomb for the testator?

Africanus Æmilianus. *Publius* was the *prænomen*, *Cornelius* the *nomen*, *Scipio* the *cognomen* (the *gens Cornelia* having several branches); *Africanus* was the surname (*agnomen*) given to Scipio, on account of his expedition against Carthage; and *Æmilianus* preserved the memory of his former family, the *Æmilian*, which he left in order to be admitted to the family of the Scipios (p. 42).

(1) It is not the same with the *determinatio* (the definition) as with the description (*demonstratio*) of a thing. The *determinatio* contains the characteristic, without which a thing is not the thing defined; e. g., if the testator said, *I bequeath the horse in my stable*, or, *the 100 solidi which I have in my coffers*, the legacy was void if the testator had no horse in his stable or no money in his coffers; for he did not bequeath a horse or a sum generally, but a thing certain, for which there could be no substitute.

A. In such case the reason constituted the *modus* of the legacy; the legatee was entitled to be paid his legacy before executing the purposes of the testator, but he had to give security that these purposes would be executed by him; and in case they were not, he was bound to restore whatever he had received.

Q. How does a *modus* differ from a condition?

A. A condition generally suspends the vesting of the legacy until the condition is actually or substantially (1) fulfilled. But conditions which consist in the not doing something, *e. g.*, not ascending the capitol, must be excepted; for they cannot be fulfilled except by the death of him on whom they are imposed; and therefore, in order that the legatee may derive some benefit during his life, he is held entitled to demand the legacy before the fulfilment of the condition; but at the same time he is bound to give security that he will restore, in case of non-fulfilment, whatever he has received, together with its fruits, or interest. Such security is called *Mutiana*, from the name of its author (B. 3, t. 19).

Q. Might a legacy precede the *institutio hæredis* (pp. 41, 135)?

§ 34. A. By the old law, legacies so placed were void, because the appointment of the hæres being the very foundation of the testament, any disposition prior thereto was held to be no part of the testament. So, also, a testator could not give freedom to his slave before appointing the hæres. But Justinian, thinking it absurd to attend more to the arrangement of the contents of the testament than to the will of the testator, allowed a legacy or an enfranchisement, even though it preceded the *institutio*, to be valid.

Q. Could a testator bequeath a legacy to take effect after the death of the *institutus* or of the legatee?

§ 35. A. By the old law he could not; for it was required that a legacy should be executed by the *institutus* (*ab hærede præstanda*, § 1); whereas the legacy supposed must have been executed by the hæres of the *institutus*: and herein legacies differed from *fideicommissa*, the execution of which might be intrusted to the hæredes of the *institutus*, and were therefore valid, though made to take effect after his death. A legacy to take effect after the death of the legatee was also null, because it was in

(1) *I. e.*, when its fulfilment no longer depended on the legatee (p. 141).

fact made to the hæredes of the legatee, who were incerti. The same reason applied to fideicommissa of the same sort, which were therefore void after Adrian declared that they should not be made to incerti (t. 23). But Justinian declared such legacies and fideicommissa thenceforth valid (1).

Q. Could a testator bequeath by way of penalty (*pænæ nomine*)?

§ 36. A. Not by the old law. Dispositions were made *nomine pænæ*, when their object was to compel the person charged with carrying them into effect to do or not to do a particular thing; as when a testator said, *If my hæres does not give his daughter in marriage to Titius, he shall pay ten pieces of gold to Seius*. Now, as these dispositions were made not so much out of kindness for the person who was to benefit by them, as to punish the person who was charged to carry them into effect, they were not considered fit subjects for legislative protection. Therefore, whether a testator left a legacy or a fideicommissum—whether he enfranchised a slave or added a hæres *nomine pænæ*—such dispositions were all void, even though the testament was that of a soldier, or made in the emperor's favour.

Q. Did Justinian retain this rule?

§ 36. A. No. He allowed the testator to impose any penalty he pleased for the non-execution of his will, provided he imposed nothing impossible, or contrary to the laws or morality.

Q. After a testament was complete, were there any other grounds upon which a legacy might become void besides the incapacity of the legatee or the testator?

§ 16. A. Yes; it might be revoked or transferred (t. 21); or the thing bequeathed might cease to exist without the interference of the hæres.

Q. Suppose a thing ceased to be in commercio, was that equivalent to its being lost?

§ 16. A. Yes: thus, when another man's slave, who was bequeathed by the testator, was enfranchised without the interference of the hæres, the legacy was null.

(1) § 35. By the old law, a legacy to take effect the day before the death was as void as one made to take effect the day after the death; but it was good if made to take effect the very moment of the death (B. 3, t. 19, § 13). After Justinian's time a legacy, to take effect after the death of the hæres, was conditional, because it was uncertain whether such death would or would not happen during the legatee's life.

Q. How if the testator bequeath a slave of his institutus who has himself enfranchised him, or given him to a third party who has enfranchised him?

§ 16. A. The hæres continues liable to discharge the legacy, and has to pay the value of the slave, even though the legacy was unknown to him; for, notwithstanding the bonâ fides of the hæres, his act of interference, by which it has become impossible to transfer the slave to the legatee, is sufficient to make the hæres chargeable.

Q. When a testator bequeathed a female slave with her children, or a slave *ordinarius* with his *vicarii* (1), was such legacy nullified by the death of the mother or the *ordinarius*?

§ 17. A. No: the legacy was held to pass the surviving slaves, for each of them was a separate bequest; and when several things are included in the same disposition, the loss of some does not invalidate the legacy as to the rest.

Q. How if a testator bequeath a slave with his peculium (*cum peculio*), and the slave dies?

§ 17. A. Here the slave is the only subject-matter; the peculium is a mere accessory; so that the slave's death must put an end to the legacy altogether. So, if a testator bequeath a piece of land properly furnished, or land with the working tools belonging to it (*fundus instructus vel cum instrumento*) (2), if the land has been alienated, and so the legatee cannot claim it, the legacy of the instruments of culture is extinguished.

Q. Suppose a flock bequeathed, and afterwards reduced to a single sheep, can the legatee bring an action in rem for it?

§ 18. A. Yes: he may sue for all that remains thereof (*quod superfuerit*) (3).

Q. Was the legatee of a flock entitled to claim sheep added to the flock after the testament was made?

§ 18. A. Yes: for when a man bequeaths a flock he does not bequeath the individual animals, so as to include none except those existing when the testament is made,

(1) *Ordinarii* were those slaves who had others, *vicarii*, as part of their *peculium* intrusted to their management.

(2) *Fundus cum instrumento* includes only the things intended for the working of the land; *fundus instructus* includes everything put on the land, to make the use and habitation thereof more agreeable or convenient.

(3) Thus, the legatee of a house may, after its destruction, sue for the materials and the land.

but the bequest is of a *whole*, which may be added to or diminished without ceasing to be the same. It is with sheep as it is with materials, which may be added to or substituted for other materials, and yet the building may continue the same.

Q. It follows, therefore, that although the legatee was entitled to nothing beyond what was bequeathed to him, still he was entitled to whatever was attached as incident to the thing bequeathed, after the making of the testament.

§ 19. A. Yes: thus, he was entitled to columns or statues put up by the testator to ornament the house bequeathed. For it is a principle, that the thing bequeathed shall be delivered to the legatee in the state in which it is at the vesting period of the legacy, or, as it is technically expressed, *cum dies legati cedit* (1): so that any addition made to it, or deterioration sustained by it before that time, was either to the profit or to the loss of the legatee. Of additions made after that time, the legatee was entitled to such only as arose out of the bequest itself; e. g., by *alluvio*: nor was the legatee charged with any deteriorations except those arising without the act of the hæres.

Q. Explain when legacies vest.

A. As a general rule, a legacy absolute in its terms vests (*dies cedit*); i. e., the interest in its subject-matter becomes fixed in a certain person when the testator dies. A legacy conditional in its terms vests when the condition is fulfilled. From either period the legatee has a vested expectation, transmissible to his hæredes, although the legacy does not become payable until the hæreditas has been accepted, or until the period (if any is attached to the legacy) has expired (2). But there is an exception to this rule where the subject-matter of the legacy is personal to the legatee, and not transmissible to his hæredes. Here it would be idle that the legacy should vest before it

(1) *Dies cedit*, "the day advances, or begins," means the vesting or fixing of the legacy; *dies venit*; "the day has come," means the day on which it is to be paid.

(2) Property in a Thing bequeathed absolutely is not *acquired* by the legatee (p. 156) until the hæreditas has been accepted; till then it is part of the hæreditas vacans. If therefore a testator bequeath a slave, the hæreditas vacans, and not the legatee, is entitled to all acquisitions made by the slave before the hæreditas has been accepted. A thing bequeathed conditionally is the property of the hæres until the condition has been fulfilled. ¶

becomes due; and therefore it does not vest until the *hæreditas* is accepted, or the period on which the legacy is to take effect has arrived. Such is the case in a legacy of usufruct, of *usus*, or of *habitatio*. Such also is the case when a legacy is made to the testator's own slave, along with a bequest of enfranchisement to him, or along with a gift of the slave himself to another legatee; for such legacy, if it vested before the *hæreditas* was accepted, would vest at a time when the slave legatee still belonged to the *hæreditas vacans*, and would be merged in it. Hence it was necessary to postpone the vesting of such legacy until the *hæreditas* had been accepted, at which time the slave legatee must have become free or subject to another legatee.

Q. Applying these principles to the legacy of a slave's *peculium*, who was entitled to the acquisitions made by such slave between the testator's death and the acceptance of the *hæreditas*?

§ 20. A. If the *peculium* was bequeathed to the slave himself, the acquisitions would be his; for, his legacy not vesting till the *hæreditas* has been accepted, must include all accessions to the *peculium* till that period, in accordance with the principle that a Thing bequeathed must be delivered over in the condition in which it happens to be at the vesting period of the legacy. But if the *peculium* was bequeathed to a third party, the testator's death would be the vesting period of the legacy, and would determine the contents of the *peculium*, so that acquisitions made by the slave after the death would belong to the *hæres* and not to the legatee; provided always, such acquisitions did not originate in the *peculium* itself (*ex rebus peculiaribus*), as the progeny of slaves, the young of animals, or alluvio, &c., but were derived from the slave's industry or from some other source.

Q. When a testator enfranchises a slave, does he thereby bequeath to the slave his *peculium*?

§ 20. A. No: in case of an enfranchisement *inter vivos*, the *peculium* is included, simply because he is allowed to carry it away (*si non adimatur*); but in case of an enfranchisement by testament, no such tacit gift can be presumed. Hence the slave enfranchised by testament, cannot demand his *peculium* from the *hæredes*, unless it has been bequeathed along with his liberty.

Q. Is the intention to bequeath the *peculium* to the enfranchised slave ever implied by circumstances, where it is not expressed?

§ 20. *A.* It may be implied: as where a slave has been directed not simply to render his account, but to pay the balance or a fixed sum out of the peculium; for here the surplus is obviously left to him.

Q. Is the slave, to whom a peculium has been bequeathed, entitled to recover what he has spent on account of his master?

§ 20. *A.* No: although the peculium is an *universitas*, including things corporeal and incorporeal, and consequently debts due to the slave by a stranger or the master himself, still Severus and Antoninus held that the bequest of the peculium should give the slave no right to claim back any money spent on account of his master, though the peculium would be so far diminished; unless the testator expressly made this part of the bequest. But in every case the enfranchised slave may set off sums spent by him against those spent by the master on account of the peculium.

Q. May not the same thing be bequeathed to several persons?

§ 8. *A.* Yes: either jointly (*conjunctim*), thus: *I bequeath my house to Titius and Sempronius*, or separately (*disjunctim*), thus: after saying, *I bequeath my house to Titius*, suppose I add, *I bequeath the same house to Sempronius*. In the first case the thing is bequeathed only once: in the second case, it is bequeathed as often as there are legatees.

Q. What is the effect of bequeathing the same thing to several persons?

§ 8. *A.* According to the old law, the thing bequeathed *per damnationem* was due by the hæres as often as it was bequeathed. If, therefore, it was bequeathed *separately* to Titius, and then to Sempronius, the hæres was bound to give the whole to both; but this being physically impossible, he had to deliver the value thereof to one of them. But if the same thing was bequeathed once only to Titius and Sempronius *jointly*, the hæres was bound to give only a half to each of them; and if the one could not or would not take his share, the hæres was discharged as to him, without his liability to the other being either increased or diminished. Each co-legatee who took had his own share and nothing more (1).

(1) A legacy *per damnationem* created a mere debt. Now it was a rule that if debts due to a creditor were assigned by him to several persons jointly, they were divisible of right. It was the same thing, then, as if each person had received his own share; and there

A thing bequeathed *per vindicationem* or *per præceptionem* (which transferred the property) could not be bequeathed more than once, for no man can alienate his property more than once. If, therefore, there were several legatees of the same thing, whether named jointly or separately, they could only come in jointly; but if one refused or was incapable of taking the legacy, the other, if there was no co-legatee, might bring his action in rem for the whole.

Justinian having abolished all distinction between the different legacies, laid down the general rule, that a thing bequeathed to several persons, whether conjointly or separately, should be divided if several came in together; and that if any one of the legatees could not or would not take the legacy, the whole should belong to the others.

Q. Under Justinian, then, was the condition of legatees, whether nominated *jointly* or *separately*, alike?

A. No: when one Thing was bequeathed to each of several legatees separately, the whole was in fact bequeathed to each. When a partition did take place, it was a matter subsequent, and the mere effect of the legatees coming in together. So that when the incapacity or refusal of one co-legatee left the other sole legatee, that other, in taking the whole, did not so much receive an addition as avoid a diminution or *decrement*. Hence he could not restrict himself to the portion he would have had if the co-legatee had come in with him, rejecting the portion of such co-legatee: but he was required to take the whole, without, however, being subject to any of the charges imposed by the testator on the legatee who had declined. On the other hand, when one Thing was bequeathed to several legatees jointly, one of them became entitled to the whole by addition or *accruer* (proper) in case the other proved incapable or renounced; for the one Thing had been given only once to co-legatees, and therefore each of them originally had a part of this one Thing. He who remained sole legatee, therefore, might refuse the share of his co-legatee who failed to take, but he could not accept it, unless he accepted subject to the charges upon it (C. vi. 51, 11).

was, therefore, no *accruer* or *jus accrescendi*. But it was different with a right *in re*, which when granted to several persons continued undivided, and gave rise to a necessary unity among the possessors of such right until actual partition. Hence, the legacy *per vindicationem* was the only one to which the *jus accrescendi* attached, when one of several co-legatees failed.

Q. Did the *jus accrescendi* operate from person to person, or from portion to portion?

A. Portion accrued to portion. So that when one of several co-legatees died after a legacy had vested in him, his portion, transmitted after death to his hæredes, was increased by all the other portions not accepted by his co-legatees (*caduæ*), p. 214.

Q. How does the *jus accrescendi* operate when there are several legatees, joint as between themselves, but separate in respect to one or more legatees?

A. Co-legatees constitute a single person; so that the portion conferred on them is subdivided between them alone, and does not pass to the other legatees, so long as any one of such joint legatees remain. If, therefore, a testator bequeathed the same thing, 1st, to *Primus* and *Secundus* jointly; 2nd, to *Tertius* alone, 3rd, to *Quartus* and *Quintus* jointly, the failure of *Secundus* would benefit *Primus* alone. Again, on the failure of *Quartus* and *Quintus*, one-half would go to *Tertius*, the other to *Primus* and *Secundus*, who would divide it between them.

Q. You say, that *collegetarii* are joint or separate, according as they appear in the same or in different dispositions; now, is there not one point of view in which both these *collegetarii* are joint?

A. Yes: legatees, to whom the same thing has been bequeathed, are said to be co-legatees in every case. They are co-legatees *re et verbis* when the same Thing has been bequeathed to several by a single disposition; and co-legatees *re* or *re tantum* when the same Thing has been bequeathed to each of several separately.

Q. Is there any third class of *collegetarii*?

A. Yes: those called joint *verbis tantum* when a Thing has been bequeathed by a single disposition, but a certain portion has been set apart for each, as thus: *I bequeath such a piece of land to Titius and Sempronius, each to have half.* Here each portion must be regarded as a separate bequest. Hence there is no unity of interest between joint legatees *verbis tantum*, and consequently no ground for applying the *jus accrescendi* as between them; the portion of the legatee who does not take must go to the hæres. But it is different where the testator, by defining the portions, does not intend to make distinct legacies, but to regulate beforehand the mode in which a legacy to several shall be carried into effect in case the several co-legatees come in together. In order to ascertain, therefore, whether there is ground for the *jus accrescendi*, we have to see

whether the testator, by defining the portions, intended to point out how the legacy should be divided, in case the legatees divided it in fact, or intended the division of the legacy into shares to be part of the disposition itself.

Q. Was not the law as to the *jus accrescendi* (p. 178) modified?

A. The laws Julia and Papia Poppæa (passed in Augustus's reign), under the name of Laws as to *caduca*, made great changes on this subject. In favour of marriage and the increase of children, they decreed that unmarried persons (*calibes*) should be incapable of receiving any thing by testament except from a near relation (1); and that married persons, without children (*orbi*) should be incapable of receiving more than half of the dispositions made in their favour. Those goods which would otherwise have come by the civil law to the *calibes* and *orbi* were called *caduca* because they dropped (as it were) from the hands of those who were called to take them (*caducum appellatur, veluti cecidit ab eo*, Ulp.). Again, as to testamentary dispositions, which, though valid in their creation, ultimately failed by the rules of the civil law, *e. g.*, because the legatees had died before the testator or refused the gift, the Lex Papia Poppæa excluded such from the effects of the *jus accrescendi*, and subjected them to the same rules as applied to *bona caduca*; they were said to be in *causâ caduci* (2). The following were the persons to whom *bona caduca* or dispositions in *causâ caduci* passed. The lex papia poppæa assigned them to those *instituti* or to legatees in the same testament who had children (*patres*). But as the same will might contain several persons having children, the law Poppæa declared that *bona caduca* should go to, 1, the co-legatees (of the failing legatees), not merely *re et verbis*, but also (singularly enough) *verbis tantum* (3); 2, the *hæres institutus*; 3, the legatees, though not joint; 4, and lastly, failing any with children, the treasury. In later times Caracalla preferred the public treasury to any body.

(1) The law Papia Poppæa did not apply to descendants or ancestors, to the third degree at least.

(2) Dispositions void in their creation (*pro non scriptis*) were not affected by the law Papia Poppæa and continued to be governed by the old rules as to the *jus accrescendi*.

(3) Co-legatees *re tantum*, probably claimed goods *caduca*, not by the *jus caduca vindicandi*, but by their own inherent right, and because there were no joint-claimants.

The rights thus conferred on the hæredes, or legatees having children, by the special provisions of the *Lex Papia Poppæa*, constitute a peculiar chapter of law known as *jus caduca vindicandi*, which was one mode of acquiring property *ex lege*. Lastly, we may observe that, to increase the chances of goods becoming *caduca*, the law *P. Poppæa* required the legatee to be alive, and capable of taking at the opening of the testament *apertas tabulas*, which period, and not the testator's death, came to be the *dies cedebat*, i. e., the vesting period of an unconditional legacy.

Q. Had not the effect of the laws as to *caduca* ceased even prior to Justinian (p. 178) ?

A. Yes, the Constitution of Caracalla destroyed the privileges attached to parentage, by substituting confiscation for the *jus caduca vindicandi*. One of the sons of Constantine restored to *calibes* and *orbi* their right to legacies, and Justinian expressly abolished the system of *caduca*, by a special Constitution, in which he re-established the principles of the *jus accrescendi*, as above explained (1).

TITLE XXI.—OF THE REVOCATION (*ademptione*) AND THE TRANSFER OF LEGACIES.

Q. How are legacies revoked ?

A. By the mere will of the testator : whereas the appointment of a *hæres* can only be revoked according to legal forms (p. 150). Revocation is express when the intention to revoke is stated in terms, or implied when proved by circumstances.

Q. Is a legacy always revoked by implication by a testator selling the article bequeathed ?

A. The mere sale does not revoke a legacy, for a testator may bequeath the property of another (2); besides the sale, there must be the intention to revoke (3). Thus,

(1) *I. e.*, when solemnly unsealed and read to those interested. The terms *caducitas*, and dispositions *caduca* (lapsed), were still used, but denoted every disposition which, valid at its creation, became void by subsequent events, *e. g.*, the premature death of the legatee, or his refusal of the legacy.

(2) It is clear that, by the old law, a legacy *per vindicationem* was null, if the thing bequeathed did not form part of the testator's estate at his decease.

(3) Hence a legacy would be revoked if such were the testator's intention, by alienation, although the alienation were void, and although the article alienated were repurchased.

a legacy continues valid if the testator has sold, not voluntarily, but from necessity. What is true as to the alienation of a Thing bequeathed is also true of a Thing pledged: for there is no revocation, unless such be the testator's intention.—But whenever part of a Thing bequeathed has been alienated or pledged, the legacy holds good for the residue (B. 2, t. 20, § 12).

Q. Was an implied revocation valid by the civil law (*ipso jure*)?

A. No; but the action by the legatee was repelled by the *exceptio doli* allowed by the prætor to the hæres.

Q. How was an express revocation made?

Pr. A. Either by the testament which contained the legacy, or by a subsequent codicil. By the old law, the revocation was required (1) to be in terms the direct contradictory of those giving the legacy (*do, lego; non do, non lego*); and in this respect legacies differed from fideicommissa, which might be revoked by any words. Justinian assimilated legacies to fideicommissa, and so made a legacy revocable by any words.

Q. Might the revocation be conditional?

A. Yes: and then the legacy was, in fact, a conditional one—the condition being just the reverse of that on which the revocation depended. But the Catonian rule still applied (p. 163); for a revocation, though it might curtail, could never increase the chances of the legatee.

Q. Could a testator transfer a legacy from one person to another?

§ 1. A. Yes; thus: *I bequeath the slave Stichus, whom I have bequeathed to Titius, to Scius*. Legacies were transferred either by the same testament or by a subsequent codicil.

Q. What was the effect of transferring a legacy?

A. The first legacy was annulled, and a second was created—both effects being independent of each other. Thus, although the revocation of the first legacy was void, *e. g.*, by the premature death of the legatee, the second legacy might be valid; so also the invalidity of the second legacy did not prevent the revocation of the first.

(1) At least by the civil law; for the prætor allowed the hæres the *exceptio doli*, though the revocation was not strictly formal.

TITLE XXII.—OF THE LEX FALCIDIA.

Q. By the Twelve Tables, could the testator exhaust the whole of his estate (*patrimonium*) in legacies?

Pr. A. Yes: In this respect he had absolute power, for the Twelve Tables said, *uti legasset suæ rei, ita jus esto*.

Q. What inconvenience followed?—what remedies were attempted?

Pr. A. The *hæredes instituti* having no interest in accepting a *hæreditas* if exhausted by legacies, frequently renounced it, so that the testator died intestate and the legacies were void. A remedy was therefore required, for the sake even of testators themselves. Hence the *Lex Furia* (1), which forbade almost every one to receive by legacy or *donatio mortis causæ* more than 1000 asses. But this law failed; for a testator, by multiplying the number of legatees, might still exhaust the whole of his estate: hence the *Lex Voconia*, which prohibited the testator bequeathing to any one more than the sum left to the instituti. But this law also failed; for by distributing his goods amongst a great many legatees, none of whom received more than the institutus, the testator had the means of indefinitely diminishing the benefit attached to a *hæres institutus*. Then came the *Lex Falcidia* (A. U. C. 714), by which a testator was prohibited from bequeathing in legacies more than three-fourths of the *hæreditas*, so that the *hæredes* together, whatever their number (*sive unus hæres sit, sive plures*), should have one-fourth of the testator's goods. This reserve-sum was called, after the law which created it, *quarta falcidia*, or the falcidian fourth.

Q. When there were several instituti by testament was each entitled to one-fourth of his portion of the *hæreditas*, without regard to the legacies charged upon the other instituti?

§ 1. A. Yes: for suppose the testator appointed two *hæredes*, Titius and Seius, and exhausted or charged to excess the portion of Titius, without charging Seius at all, Titius was entitled to retain, out of the legacies with which he was personally charged, as much as would secure him in

(1) The *lex furia testamentaria*, which must not be confounded with the *lex furia* or *fusia Caninia*, restricting the freedom of testamentary enfranchisement (B. 1, t. 7), was passed A. U. C. 571, and the *lex Voconia* A. U. C. 585, on the proposal of the tribune *Voconius Sæxa*.

one-fourth of his portion of the *hæreditas*; nor did it matter that Seius had the fourth of the whole *hæreditas*, for the calculation of the falcidian law applied to each *hæres* separately.

Q. How is it when two portions of the *hæreditas*, the one surcharged with legacies, the other not charged at all, or charged with less than one-fourth, are united by the effect of the *ius accrescendi*?

A. There is a distinction. If the portion charged with legacies accrue to the portion not charged or undercharged, the fourth is deducted from each portion, but if the portion not charged at all, or undercharged, accrue to the portion surcharged, the fourth is deducted from the whole, for this is a clear benefit to the portion charged.—The falcidian fourth is deducted from the whole *hæreditas*, when the different portions are united in the same person by a substitution.

Q. How is the sum of the *hæreditas* made up, in order to calculate whether the legacies exceed three-fourths thereof? How is it valued?

§ 2. *A.* This sum total is made up of everything corporeal and incorporeal included in the *hæreditas* at the testator's death. Debts due to him are valued as assets, according to the solvency of his debtor. Debts due on a condition are valued at the sum for which they may be sold. To these are added all debts from which the *hæres*, as debtor to the deceased, is discharged by the *confusio* arising from the *hæres* being also debtor.

The various items of this sum total are to be reckoned at their fair value, taking as the basis their condition and price at the testator's death.

Q. Is any account taken of the changes which may have affected the *hæreditas*, by way either of increasing or diminishing its value since the testator's death?

§ 2. *A.* No. The legacies must be reduced if they were such as to exhaust the *hæreditas* at the testator's death, though it may be afterwards so much increased by acquisitions made through slaves of the *hæreditas*, or by the increase of animals, &c., that the *hæres* might have his fourth, even after deducting the whole of the legacies. On the other hand, the legacies must be paid in full unless they exceeded three-fourths of the *hæreditas* at the testator's death, whatever losses such *hæreditas* may afterwards sustain (1). Ob-

(1) But, if a *specific Thing* bequeathed to a legatee has been lost by accident, the *hæres* is not bound to pay him its value.

serve, however, that the hæres, by renouncing, annuls the testament and all the legacies incident to it, and thus the legatees are interested in arranging with the institutus when the goods have been deteriorated before the hæreditas has been accepted, so as to prevent the hæres renouncing the hæreditas (1) as unprofitable.

Q. Before calculating the falcidian fourth, ought not certain deductions to be made from the sum total of the goods?

§ 3. A. Yes, viz., the debts of the deceased (2), the funeral expenses, and the value of the slaves enfranchised, and of those whom the hæres is bound to enfranchise. The residue forms the net sum out of which the hæres retains one-fourth. If the legacies exceed this net sum we must first deduct the excess, and then make the falcidian reduction. Such reduction affects all the legatees indiscriminately, in proportion to the value bequeathed to each of them (3).

Q. Are the sums received by the hæres institutus from the testator, except those received by him as hæres, reckoned part of this falcidian fourth?

A. No: it includes neither gifts made to the hæres during the testator's life, nor legacies, nor trusts (*fideicommissa*), made in favour of the hæres, so far at least as regards the sum to be contributed by his cohæredes; for as to the portion of the legacy with which the hæres has to supply himself, such portion becomes part of the share to which he is entitled as hæres, and is received by him as such.

Q. Does the *lex falcidia* reduce the legacies directly?

A. No: it simply entitles the hæres, if in possession of the goods, to set up the *exceptio doli* against the legatee, to the value of the fourth; and in case the legatee detains the thing bequeathed, because, e. g., the testator may have placed it in his hands as a deposit or *commodatum* (loan),

(1) When the instituti, being also *hæredes legitimi*, renounced the appointment in order to take the succession *ab intestato*, and to relieve themselves from executing the intentions of the deceased, the prætorian law allowed the legatees and *fideicommissarii* an action against them (B. 3, t. 11, Nov. 1. c. 1).

(2) *Bona intelliguntur quæ deducto ære alieno supersunt.*

(3) But there are exceptions, as when the testator directs an addition to be made to a legacy of that by which it is reduced; the whole reduction is, in such case, to be made from the other legacies.

the hæres may demand it back, or even bring an action in rem for that portion of it which he is entitled to deduct.

Q. If a hæres discharged the legacies without claiming the benefit of the *lex falcidia*, could he claim back the sum paid in excess of the three-fourths?

A. By the old law the hæres could not by action claim back anything paid by mistake, even though it was not due; but fideicommissa discharged by mistake, might be claimed back. After legacies were assimilated to fideicommissa, it is probable that by the Constitution of Gordian (C. vi. 50, 9.), as to fideicommissa, the hæres claim back anything paid, through a mistake in fact, to the legatee if it was not due, but he could not claim back anything paid knowingly or through an error of law.

Q. Was the falcidian law applicable to the testaments of soldiers?

A. No.

Q. Could the testator forbid, the fourth being retained?

A. Not before the Novella of Justinian; even renunciation by the hæres, before the testator's death, of any benefit under the *lex falcidia* was void; but by Nov. 1, (c. 2, § 2), the falcidian fourth could not be retained when the testator so expressed his intention; and even when the testator did not directly prohibit its being retained, the hæres could not retain it unless he had made an inventory, because it was presumed that there would have been no necessity for applying the falcidian law unless something had been abstracted. Nay, in the absence of an inventory, it would seem that the hæres was bound to pay the legacies in full, although they exceeded the full value of the hæreditas.

TITLE XXIII.—OF FIDEICOMMISSARY HÆREDITATES, AND
THE SENATUS-CONSULTUM TREBELLIANUM.

Q. What was the origin of *fideicommissa*?

Pr. A. It often happened that a Roman citizen desired to benefit, by an act of last will, some person with whom he had no *testamenti-factio*, or one who could receive only a part of what was left to him (1). In order to attain this end, a plan was adopted of appointing a hæres, or naming a legatee capable of succeeding, requesting him at the same

(1) For instance, a *peregrinus*, an unmarried person, and, before Hadrian, an *incertus* (p. 168).

time (1) to transfer to the party really to be benefited, the whole or a portion of the *hæreditas*, or of the legacy. Such were the first *fideicommissa*. Neither *hæres* nor legatee was bound by the civil law to carry such requests into effect, which were thus intrusted to their sense of honour and good faith (*fideicommissa*); but in course of time Augustus desired the consuls to see to the execution of *fideicommissa*. The interference of these magistrates, which was both just and popular, gradually became a regular jurisdiction, and it was not long before a special prætor, called *prætor fideicommissarius*, was appointed to decide cases *fideicommissa extra ordinem* (B. 4, t. 6).

Q. Was the power retained of making dispositions, under the form of *fideicommissa*, in favour of persons incapable of being appointed *hæredes*, or of receiving legacies?

A. No: such power was from time to time modified, until the principle was established; that the same capacity was required in order to receive the benefit of a *fideicommissum*, as to receive the benefit of a legacy (2). Nevertheless, *fideicommissa* continued exempt from most of those strict rules of the civil law, to which legacies and *institutiones hæredum* continued subject (3).

Q. It being important to distinguish a legacy from a *fideicommissum*, explain the distinction.

A. It lies in the terms used by the testator. A legacy must be given (*legis modo et civilibus verbis*) (4) by the formulæ appropriate to the purpose; a disposition expressed in any other terms was a *fideicommissum*. But when Constantine did away with the necessity of using technical forms, it became difficult to draw the distinction.

(1) Justinian says that, originally, *fideicommissa* were not obligatory, because no one was bound to carry the request into effect. It is more accurate to say, that the testator made use of precatory words because he could not command the thing to be done.

(2) Such was the general rule in Ulpian's time.

(3) Thus, whilst legacies could only be made by a *testator*, and charged only on the *hæres institutus*, *fideicommissa* might be made even *ab intestato*, and charged on all those who, though not *hæredes*, had received something from the deceased (other distinctions, pp. 160, 168, 172). The *fideicommissum* did not immediately transfer the property, nor give an *actio in rem*: it only imposed an obligation and conferred a right of *actio in personam* (*condictio*).

(4) Ulp. (Reg. 25, 1) defines it: *quod non civilibus verbis sed præcative relinquitur: nec ex rigore juris civilis proficiascitur, sed ex voluntate datur relinquentis.*

This, of course, induced Justinian to put legacies on the same footing as *fideicommissa*, and to assimilate their results.

Q. What things might be given by *fideicommissum* or trust (1)?

A. Particular things (t. 24), or *universitates* of rights and actions.

Q. A trust might therefore include the whole or only a portion of the *hæreditas*?

§ 2. A. Yes: and such *fideicommissum* might be given either by testament or *ab intestato* (by *codicil*), (*vide* t. 25, post) (2). If a person meant to dispose of the whole or of any portion of his *hæreditas* in favour of a *fideicommissarius* (cestui que trust) (3), his course was to appoint a *hæres* (4), and to direct him to make a transfer of it (*restituere*) to the person designated. Thus, after saying, *Lucius Titius hæres esto*, he would add, *Rogo te, Luci Titi, ut cum primum poteris hæreditatem meam adire, eam Caio Seio reddas, restituas*. Moreover, the *fideicommissum*, though it included the whole *hæreditas*, might be left unconditionally or conditionally, or to take effect after a time certain (p. 140).

Q. How was the *restitutio* of the *res hæreditaria* effected?

A. It was completed before delivery; for the *hæres*, by merely consenting, divested himself of his rights as *hæres* over the Things in question, in favour of the cestui que trust.

Q. Did the *hæres* cease to be such after the *hæreditas* was transferred to the cestui que trust?

§ 3. A. No: he continued *hæres*; but the cestui que

(1) I shall use these words as synonymous.

(2) The power to impose a trust on *hæredes ab intestato* seems contrary to the principle that no one is bound to give up what he has received: for the *hæredes legitimi* may be said to receive nothing from the deceased but from the law. But observe, the deceased has in fact made a gift to the *hæredes legitimi* by not excluding them: tacitly, but really, he makes them his *hæredes*. Hence he who could not make a will could impose no trust on his *hæredes legitimi*, for they succeeded by mere operation of law. Legacies, unlike *fideicommissa*, required a testament (*nisi ex testamento*, § 10); and though given by a *codicil*, such *codicil* had to be confirmed by a testament (*vide*, tit. 25, post).

(3) *I. e.*, he for whose benefit the trust is made (p. 49).

(4) For if there was no *hæres* institutus to the testament the trusts it contained were null. Compare § 2 with § 10.

trust, though not a *hæres* (proper), was assimilated in some cases to the *hæres* by the Sc. Trebellianum, and in other cases to a legatee *partiarius*, by the Sc. Pegasianum.

Q. Explain the history of the law in this matter.

A. Formerly, the *hæres* transferred the *hæreditas* to the cestui que trust by a fictitious sale; and then the cestui que trust was regarded neither as a *hæres* nor as a legatee *partiarius*, but as purchaser of the *hæreditas* (Gaius, 2. 252). Now the vendor of an *hæreditas* did not divest himself of the character of *hæres*, which was indelibly stamped upon him; he could do no more than transfer the benefits and burdens incident to him as *hæres*. Hence he alone continued liable to the actions brought by creditors and legatees, and was alone entitled to bring actions against debtors to the *hæreditas*; but the *hæres* and the purchaser entered into mutual guarantees in the form of stipulations *emptæ et venditæ hæreditatis*, to secure to the cestui que trust all moneys received by the *hæres*, and to secure the *hæres* repayment of all moneys paid on account. Such were the stipulations between the *hæres fiduciarius* (trustee) and the cestui que trust.

Q. What inconvenience attached to this mode of *restitutio*?

§ 4. A. It often happened that the *hæredes*, unwilling to continue liable to the creditors and legatees, and at the same time fearing lest the insolvency of the cestui que trust should defeat their right to be reimbursed, refused to accept the *hæreditas*, which refusal annulled the testament. Hence the Sc. Trebellianum (A. D. 62), which decreed that after the transfer of the *hæreditas*, in obedience to the trust, all the actions which by strict law (*jure civili*), lay by or against the *hæres*, should be brought by (1) or against the transferee or cestui que trust. Hence, after this Sc., the cestui que trust took, in fact, the place of *hæres*.

Q. Had this Sc. the effect of compelling the *hæredes* to accept the *hæreditas*?

§ 5. A. No; whilst it secured the *hæredes* from all risk, it gave them no benefit beyond that which was reserved to

(1) These actions were called (§ 4) *utiles*, for the cestui que trust was not the *hæres* proper; though direct actions might still be brought against the *restitutor*, who was the *hæres* proper, they were barred by the *exceptio restituta hæreditatis* allowed by the Sc.

them by the testator. Hence those instituti who were bound by the testament to transfer the whole, or almost the whole *hæreditas*, refused to accept it, since the benefit to them was nothing, or next to nothing: consequently they were authorised to retain a fourth out of the *fideicommissa* either of *universitates* or of specific articles, just as in case of legacies by the *falcidian* law. This was the leading provision of the *Sc. Pegasianum* (A. D. 73).

Q. When the *hæredes* retained a fourth by the *Sc. Pegasianum*, did the right to bring actions and the liability to answer the same, originally attached to the *hæres*, pass to the *cestui que trust*?

§ 5. A. No; this *Sc.*, as it allowed the *hæredes* to retain a fourth, left them capable to sue and liable to be sued; thence the *cestui que trust* was regarded not as a *hæres*, but as a legatee *partiaris*; and the stipulations between the *hæres* and the legatee *partiaris* were used as between the *hæres* and the *cestui que trust*, who received the *hæreditas*; i. e., the *hæres* and the *cestui que trust* contracted mutual engagements, in the form of stipulations *partis et pro parte*, to share the profit of sums received from debtors to the *hæreditas*, and the loss occasioned by sums paid to the creditors of the deceased.

Q. Did the *Sc. Pegasianum* contain other provisions as to *fideicommissa*?

§ 6. A. Yes; by it, if the institutus refused (*recuset*) to accept the *hæreditas*, alleging doubts as to the amount of the incumbrances on it, the prætor might, on the demand of the *cestui que trust*, compel him to accept and to transfer the *hæreditas*, without retaining anything; but the actions were brought by or against the *cestui que trust*, as if the case had been under the *Sc. Trebellianum*. In this case the operation of both *Sc.* concurred.

Q. Did the *Sc. Pegasianum* repeal the *Sc. Trebellianum*?

A. No: but they applied to different cases.

Q. When did the *Sc. Trebellianum* apply?

§ 6. A. It applied, and consequently the *cestui que trust* occupied the place of *hæres*; 1. When the amount which the institutus was bound to transfer did not exceed three-fourths of the *hæreditas* (1); 2. When the institutus,

(1) Here actions were brought both by and against *hæres* and *cestui que trust* in respect of their separate portions, viz. against the *hæres* by the civil law, and against the *cestui que trust* by the *Sc. Trebellianum*.

not wishing to accept the *hæreditas* for himself, accepted it by the prætor's direction, at the risk of the *cestui que trust*; 3. Lastly, when the *hæres*, not wishing to retain anything out of a *hæreditas* which he had voluntarily accepted, expressly declared that he transferred by the *Sc. Trebellianum*.

Q. When did the *Sc. Pegasianum* apply?

§ 6. A. When the trust included the whole, or more than three-fourths of an *hæreditas*, which the *institutus* voluntarily accepted and transferred, *minus* his fourth, or even without retaining the *Pegasian fourth*, unless, indeed, in such last case, he declared that he transferred such *hæreditas* by the *Sc. Trebellianum*. If there was restitutio under the *Sc. Pegasianum*, of three-fourths of the *hæreditas*, the *cestui que trust* was considered legatee *partiarius*, and the stipulatio *partis et pro parte* was used; but if, instead of three-fourths of the *hæreditas*, there was restitutio of the whole, the *cestui que trust* was deemed a purchaser, and the *stipulatio emptæ et venditæ hæreditatis* was used.

Q. Did not the intricacy of these rules and the inconvenience arising from the stipulations (1) of the *Sc. Pegasianum*, induce Justinian to simplify the restitutio (transfer) to *fideicommissarii*?

§ 7. A. Yes: he abolished the *Sc. Pegasianum*, or, rather, combined the provisions of both laws into one, which continued to be called *Sc. Trebellianum*. By this new law the *hæres*, who voluntarily accepted the *hæreditas*, might retain one-fourth thereof (2) without being made liable to any charges beyond those attaching to such portion of the *hæreditas*, the right to bring actions, and liability to answer the same, being transferred to the *cestui que trust*, in proportion to the value of the part of the *hæreditas* claimed by him. If the *hæres* refused to accept the *hæreditas*, he might be forced to do so, and to transfer it entire, at the risk of the *cestui que trust*.

(1) Justinian says that the inconvenience of these stipulations was felt by the ancients, and that Papinian declared them *captiosas*. For in the series of actions and accounts to which they gave rise, each party was exposed to the danger of the other being insolvent.

(2) Justinian allowed the *hæres* to recover any sum beyond the three-fourths paid through mistake (of fact) to the *cestui que trust*.—P. 184 applies here as to valuation and reduction.

Q. Was the hæres appointed to a portion of an hæreditas entitled to deduct a proportional part thereof, as the hæres appointed to the whole was entitled to deduct the fourth?

§ 8. A. Yes: it mattered not in this respect whether the hæres appointed to the whole hæreditas was requested to transfer the whole or a part thereof, or whether the hæres appointed to a portion of an hæreditas was requested to transfer the whole or a part of such portion. The same rule applied to both cases (p. 183).

Q. When a testator, instead of leaving the fourth to the institutus, reserved to him one or more specific articles, *e. g.*, a piece of land, a sum of money equal in value to at least a fourth of the hæreditas, by which of the Sc. was restitutio made?

§ 9. A. By the Trebellianum, just as if the fourth had been reserved; in both cases the cestui que trust was *loco hæredis*, and he might bring, and was liable to answer, all actions incident to the hæreditas. But there was this difference: where the testator had reserved the fourth of the hæreditas, the hæres and the cestui que trust were entitled to bring and liable to answer actions according to the share which each of them had in the hæreditas, just as if they had been *co-hæredes*; but where the testator had reserved to the hæres certain specific things, the hæres held them as legacies (*quasi ex legato*), and not as a portion of the hæreditas, and therefore the right to bring and the liability to answer actions, was with the cestui que trust alone. Since, therefore, these specific things might exceed in value the residue of the successio after payment of debts, it was for the cestui trust, who had alone to answer the charges on the hæreditas, to consider whether he should accept or refuse the proposed transfer (*an expediat sibi restitui*). This law was retained by Justinian.

Q. If the specific things reserved for the hæres were less in value than the fourth, what was the position of the hæres?

A. He might demand a sum to make up his fourth, by the Falcidian law applied to fideicommissa by the Sc. Pegasianum, the rules of which governed the case (p. 190). But after Justinian's time the actions were divided between the cestui que trust and the hæres, who took an aliquot part of the hæreditas (§ 7).

Q. Were the hæredes *ab intestato* entitled to the same deduction as that allowed to the *instituti*?

§ 10. A. Though the Sc. Pegasianum did not authorize

any deduction to be made out of the fidei-commissa, except in favour of the *institutum*, the same benefit was afterwards extended to the *legitimi*.

Q. Could a cestui que trust be himself required to transfer to another cestui que trust?

§ 11. A. Yes: and the *hæreditas* might thus be transmitted by a series of transfers; but the cestui que trust, charged to transfer the *hæreditas* to another, could not retain the fourth, even when the *hæres* had not retained it; because, *e. g.*, he had accepted in compliance with the prætor's order, and at the risk of the cestui que trust. For the only object of allowing the *hæres* to retain a fourth was to secure a *hæres* for the deceased; hence this retention was allowed only to persons who were capable of being *hæredes*, and of continuing so.

Q. Was a cestui que trust entitled to retain the falcidian fourth out of the *legacies*?

A. Yes: because he was only liable to pay the *legacies* as *hæres*.

TITLE XXIV.—OF SPECIFIC THINGS LEFT BY WAY OF TRUST.

Q. Upon whom might the charge of executing a trust in respect to a specific thing be imposed?

Pr. A. Upon any one of those who had received anything from the deceased, *e. g.*, a legatee; but *hæredes* alone could be charged with *legacies*. This rule, like that which made it impossible that *legacies* should exist *ab intestato*, continued after *legacies* were assimilated to fidei-commissa. Hence the disposition which a legatee was charged to execute, was not properly a legacy, but after Justinian's time it was considered as a fidei-commissum, and, as such, produced its peculiar results.

Q. Mention the specific things which may be disposed of by way of trust.

§ 1. A. Whatever may be bequeathed by the legacy *per damnationem* of the old law. Thus, a person may dispose by way of trust, not merely of his own property, but of that belonging to the *hæres*, or to any other person. If a person dispose, by way trust, of the property of another, the trustee is bound to purchase and deliver the thing, or to pay the value thereof.

Q. Then a person may be charged as trustee, to transfer something different from what he has received as legatee, or as the first in a series of cestui que trusts?

§ 1. A. Yes: the only rule is this:—The legatee or the

first *cestui que trust* must not be charged to transfer more than he has received, for a trust would be null as to the excess (*quod amplius est inutiliter relinquitur*). But if the thing to be transferred belongs to the trustee, he cannot, after having accepted the disposition made in his favour, get rid of executing the whole trust, whatever its extent, because he must be taken to have deliberately estimated his own goods as of less value than what he has received.

Q. May freedom be given to a slave by means of a trust?

§ 2. A. Yes: by charging the *hæres*, a legatee, or a *cestui que trust*, with his enfranchisement. The testator may thus enfranchise a slave belonging to himself, or to the trustee, or to any other, but a testator cannot confer liberty *directly* on any slave, unless the slave belong to him, both at the time of making his testament and at his death (1).

Q. What was the effect of a trust by which the trustee was charged to enfranchise the slave of another?

§ 2. A. The trustee was bound to buy (*redimi*) the slave, and to enfranchise him. But as the master was not bound to sell (2), his refusal to do so at a fair price did not extinguish the trust, but simply put off the execution thereof until an opportunity occurred of purchasing the slave and enfranchising him.

Q. Mention the most ordinary forms in which trusts were couched.

§ 3. A. *Peto, rogo, volo, mando, fidei tua committo*. The terms *injungo, impero*, were also used.

Q. These expressions, *volo, injungo, impero*, are very imperative, and yet the texts assert that trusts were couched in precatory, not in imperative terms, like legacies.

A. It is to be observed that the legacies expressed the *imperative* will of the testator, and that the verbs used were also in the imperative mood. Thus legacies were in this form:—*damnas esto, sumito, capito*, &c.; but in case of a *fidei-commisum* the indicative was used. The only

(1) When the testator conferred liberty directly on his slave, he was freed by the testament itself; the testator, *i. e.*, the deceased, was his patron: hence the name *libertus orcinus*. But when the testator charged a trustee to grant freedom, the slave was freed not by virtue of the testament, but by manumission executed by the trustee. Hence this slave's patron was not the deceased, but the trustee who manumitted (p. 96).

(2) Unless he had received something from the deceased.

ground, therefore, upon which the testator could be said to use the precatory form of expression was this,—that he did not use the imperative mood.

Q. Were the forms mentioned by you peculiarly appropriated to the creation of trusts?

A. No: the testator had only to express his will by some sign or other. Hence Justinian decreed that trusts might be created verbally or by writing, provided it was done before five witnesses.

Q. Was a trust created before less than five witnesses of any effect?

T. 23, § 12. A. Justinian allowed the *cestui que* trust in every case to tender the oath to the person whom he charged with the trust. If he refused to swear that no trust had been imposed upon him, his refusal was deemed an admission, and involved his condemnation. But the defendant might first of all require the demandant to swear that he was acting *bonâ fide*, and not on mere frivolous grounds; and this is what Justinian calls *de calumnia jurare*.

TITLE XXV.—OF CODICILS.

Q. Define a codicil.

A. A codicil is an act by which a man expresses his last will without using, and deliberately intending not to use, the solemnities peculiar to a testament (1).

Q. What was the origin of codicils?

Pr. A. Certainly, prior to Augustus, codicils were not in use. Lucius Lentulus first introduced both *fidei-commissa* and codicils. For, dying in Africa, he wrote codicils, which were confirmed by a testament, and in them he requested Augustus to undertake the execution of a trust. The emperor fulfilled his will; and, other persons following his example, executed trusts with which they were charged by codicils, and the daughter of Lentulus herself paid legacies, though in strictness of law invalid. It is said that Augustus convoked the great jurists, and amongst them Trebatius, at that time in high repute, in order to consult them whether codicils should be admitted, and that Trebatius convinced the emperor of their advantages, chiefly because it might often happen that a man on a

(1) An intention to dispose by codicil must appear, so that an imperfect testament is not a valid disposition.

journey would be able to make a codicil when it might be utterly impossible for him to make a testament. And afterwards, when the jurist Labeo made codicils, no one hesitated to admit their validity.

Q. Might the *hæreditas* be disposed of in a codicil?

§ 2. A. No : and herein codicils differed essentially from testaments. By codicil a person could neither give nor take away the *hæreditas*, nor could he, by adding a condition or expunging it, change the mode in which the *hæreditas* was disposed by testament. But we must be understood to speak only of the *hæreditas* proper; for the *hæreditas fidei-commissaria*, which conferred neither the name nor the rights of a *hæres* proper, might be left by codicil like any other trust.

Q. Is any other person besides one who has made a testament competent to make a codicil?

§ 1. A. Persons dying intestate may leave codicils. But no one can legally make a codicil who cannot legally make a testament.

Q. Were codicils revoked by a subsequent testament wherein they are not confirmed?

§ 1. A. Papinian said that codicils anterior to the testament were valid only so far as the testator expressly confirmed them. But the emperors Severus and Antoninus held it sufficient if the testator did not show any intention to revoke the dispositions contained in the codicils (1).

Q. Did codicils confirmed by a testament subsequent or anterior thereto, enjoy any particular advantage?

A. Yes : codicils confirmed by testament were deemed part of the testament. Hence a person by such codicils might revoke or transfer a legacy, or enfranchise a slave directly (2); whereas by codicils not confirmed, nothing but trusts could be created.

Q. When there was a testament, did the fate of the codicils depend on it?

A. Yes : the failure or nullity of the testament nullified the codicils. In this respect codicils, whether confirmed or not confirmed, were on the same footing.

(1) Codicils subsequent to the testament never required confirmation. But it often happened that a testator confirmed beforehand any codicils he might afterwards make; this Lentulus did.

(2) But by them no dispositions could be made as to the *hæreditas*.

Q. Could one person leave several codicils ?

§ 3. A. Yes. A testament always included the whole *hereditas*, and therefore could not co-exist with any preceding one. But if there were several codicils, each might relate to different subject-matters, and the last revoked only such of the dispositions in the preceding codicils as were irreconcilable with those which it contained.

Q. In case of codicils was any solemn form requisite ?

§ 3. A. Originally none ; but under the emperors of Constantinople they were made subject to certain forms. For (C. 6, 36, 8) a codicil was required to be made at one time, either verbally or in writing, before five witnesses summoned for the purpose, or brought together by chance. If the codicils were in writing, the witnesses were required to put their marks thereto (*subnotationem suam*).

BOOK III.

TITLE I.—OF HÆREDITATES WHICH PASS AB INTESTATO (1).

Q. WHEN does the hæreditas pass *ab intestato*?

Pr. A. A person dies intestate, 1. When he has made no testament at all, or one which is irregular or void (*non jure factum*); 2. When a testament valid in its creation has become invalid (*ruptum irritumve*), or has been set aside as *inofficious*; 3. When the testament is abandoned, because the *hæres institutus* has not appeared.

Q. Explain the system of the Twelve Tables as to succession *ab intestato*.

§ 1. *A.* The Twelve Tables called as successors, 1st, the *sui hæredes* of the deceased; 2nd, his *agnati* (2).

Q. Was this system continued until that of the *Novellæ*?

A. Yes: but by that time the prætorian law, *senatus consulta*, and Constitutions had introduced into the orders of *sui hæredes* and *agnati* some who were originally excluded from both. Moreover, the prætorian law granted the possession of goods to a third class, called *cognati* (3).

Q. We shall discuss, therefore, 1. *Sui hæredes* proper; 2. Those ranked with them by the prætors; 3. Those ranked with them by the Constitutions. First, who were *sui hæredes* proper?

§ 2. *A.* *Sui hæredes* were children (4) under the paternal power of the deceased at his death, and first in degree in the family when the succession arose (5). Thus,

(1) *Hæreditates* which pass *ab intestato* are called *legitima*, because they pass directly (*lege*) by the law.

(2) 3rd, the *gentiles*, the members of a larger family than the *agnati* (Gai. 3, 17). Justinian omits them because they no longer existed.

(3) Perhaps the prætor replaced the *gentiles* by the *cognati*.

(4) Children both natural and adopted, and, by the new law, legitimised children (§ 2).

(5) *I. e.*, who would have been under the immediate power of the deceased when the succession arose, if the deceased had then been living.

grandchildren, if they and their father were under the grandfather's power, were not his *sui hæredes*, because they would rank after the father in the family, so that he would be the *suus hæres*.

Q. When does a *successio ab intestato* arise?

§ 2. A. Whenever it is ascertained that there will be no hæres by testament. Now it is certain from the time of death there will be no such hæres if there is no valid testament. There is no such certainty until after the death, if the deceased has left a valid testament which may call a hæres into existence; in the latter case, then, a succession does not arise until the existence of a testamentary hæres has become impossible, either by the hæres *institutus* renouncing or for some other reason.

Q. Might not the grandchildren, who became subject to their father on the grandfather's death, become *sui hæredes* of the grandfather?

§ 7. A. Yes: as where the grandfather disinherited by testament his son, and appointed a stranger hæres in his stead. The grandchildren, on the death of the grandfather in whose family they ranked after the father, became subject to the father; but if their father afterwards died, and the hæres appointed by the grandfather was either unable or unwilling to accept the hæreditas, it passed to grandchildren directly, because nobody ranked before them when the succession arose, and because, had the grandfather then been alive, they would have been under his immediate power.

Q. Might such grandchildren be *sui hæredes* of the grandfather, though not born during his life?

§ 2. 8. A. To be conceived during the grandfather's life was enough; for grandchildren on being conceived became members of the grandfather's family, and thenceforth subject to his power; the being born after his death was of no consequence.

Q. Could a grandchild conceived after the grandfather's death ever be *suus hæres*?

§ 8. A. Never: because he was never allied to his grandfather by any tie of relationship (1); and therefore the mere fact that the one is descended from the other did not connect him at all with the hæreditas (*non sunt quantum ad hæreditatem liberi*). As then a person, in

(1) § 8. Hence he could not claim the *possessio bonorum* (*unde cognati*) granted by the prætor to the nearest cognati.

order to be a *hæres legitimus* must be in existence when it is ascertained that there will be no *hæres* by testament, so, on the other hand, he must have existed, *i. e.*, been conceived before the death of the *de cuius*. Hence the *hæres* general of a man will always be a person living at his decease; and his *suius hæres* a person not only living at his decease, but then under his power.

Q. But does not Justinian put a case in which a person, though not subject to the deceased at his death, was still *suius hæres*?

§ 4. A. Yes: when a *filius-f.* returned from captivity, after the death of the *pater-f.*, whose *suius hæres* he became, though not, in fact, subject to such *pater-f.* at his death. This, however, was no real exception to the general principle; for if the *filius-f.*, without being subject to the *pater-f.* at his death, became his *suius hæres*, it was by a legal fiction; according to which the *filius-f.* was supposed never to have been a captive, and therefore to have been subject to the *pater-f.* at the time of his death.

Q. On the other hand, was it possible for children who were under the direct power of the *pater-f.* at his death not to be *sui hæredes*?

§ 5. A. Yes: *e. g.*, if the *pater-f.* was adjudged after death guilty of high treason (*perduellio*), by which his memory was condemned. For then his succession went to the public treasury; he could have no *suius hæres*, or rather, sons already *sui hæredes* were divested of that character. These results followed from the fact that the charge of high treason took effect against deceased persons, and the judgment against the memory of the culprit dated back to the commission of the crime. Thenceforth such culprit was considered civilly dead, and divested of the paternal power, so that his children then became *sui juris*, and could not at his death become *sui hæredes* of their father, who, leaving neither *hæreditas* nor *hæres*, could be succeeded only by the *fiscus* (1).

Q. Amongst descendants subject directly to the power of the deceased, did those of a nearer exclude those of a more remote degree from the succession?

§ 6. A. No: they were all called to the *hæreditas*. Thus the son or the daughter did not exclude the children

(1) In general, those who suffered *maxima* or *media* d. c. never had any *hæredes*. The goods of a *pater-f.*, *deportatus*, or *pamæ servus* went to the *fiscus*. As to slaves, (t. 12, *post*). As to *Lex Cornelia*, (p. 129).

of a deceased son; but these children stood in place of their father.

Q. Was the division into equal portions?

§ 6. *A.* No: the grandsons or the great-grandsons shared between them the portion of the ancestor in whose place they stood. For a *hæreditas* may be divided among *sui hæredes* in one of two ways: 1st. *Per capita*, or one share to each; i. e., the property was divided into as many equal shares as there were *sui hæredes*, if they were all of the first degree; or, 2nd, if the *sui hæredes* were of a lower degree, the *hæreditas* was divided *per stirpes*; i. e., descendants of a lower degree shared between them the share of the *filius-f.* whom they represented, each child of the first degree being considered as a *stirps* or stem of the various branches of descendants. Thus, if one of two sons died leaving children, these children would succeed to half the *hæreditas*; the other son to the other half. So, if both sons died before the *pater-f.*, and one left two children, the other four, the *hæreditas* was divided into two; one for the two children of the first, the other for the four children of the second son.

Q. How was the *hæreditas legitima* acquired by the *sui hæredes*?

§ 3. *A.* It was acquired (1) at the moment the succession arose (*delata*), independently of any will, consent, or authority.

Q. Who were reckoned *sui hæredes* by the *prætorian* law?

§ 9. *A.* Though by the civil law children who were not under the power of their deceased father at his death, and who were therefore not bound to him by any civil tie (*agnatio*), were not *sui hæredes* proper, still the prætor admitted such children to share in the *successio* if, on the death of the *de cuius*, they were still citizens, under no stranger's power, and not members of a stranger's family. Thus he admitted as successors of a *pater-f.* an emancipated son; he admitted, as successors of the grandfather, grandchildren conceived after their father's emancipation (2); he admitted as successors of the emancipated son the grandson who was conceived before the father's emancipation, though he continued under the power of the

(1) Like the *hæreditas testamentaria* (p. 155).

(2) Provided their father was already dead; for grandchildren do not succeed their grandfather except in default of their father.

grandfather; and the same benefit was secured to the child who had suffered the *media* or *maxima diminutio capitis*, when such child was afterwards restored to its position as citizen.

Q. Were such children called by the prætor *heredes*?

§ 9. A. No: for that title belongs to such children only as have it by the civil law; but the prætor granted them the *possessio bonorum unde liberi*, as if they had been *sui heredes* proper. Hence, then, *sui heredes* proper succeeded only to a portion (*pro parte*, § 9) of the *hereditas*, for they were obliged to share it with those whom the prætor appointed to the possession of the goods *unde liberi*.

Q. Were not the children who, by the prætorian law, were allowed to share in a succession from which the civil law would have excluded them, bound to make some contribution?

A. Yes: by sharing in the goods of the family, as if they had never ceased to be members thereof, these children derived all the benefits of acquisitions which were made by the other children who continued under the power of the pater-f., by which acquisitions, of course, the property of the family, was increased; it was therefore right that the children admitted by the prætorian law should carry to the account of the family property such goods as they had at the death of the pater-f., which goods would have been acquired for him if they had never ceased to be under his power (1); and this was called the *collatio bonorum* (bringing the goods into *hotchpot*) (D. 37, t. 6).

Q. Did the prætorian law, when it granted the possession of goods *unde liberi* to the emancipated son exclude the grandchildren who continued under the power of the grandfather, and had taken the place of their father in the family?

A. Yes: this necessarily followed from the fiction, according to which the emancipation was considered null. But by a provision which Salvius Julianus added to the edict, the grandsons who continued under the power of the grandfather were admitted to share equally with their emancipated father in the portion which, according to the old

(1) They did not bring to the account *peculium castrense* or *quasi castrense*, nor, according to the new law, such goods as would have formed part of the *peculium adventicium*, because, if the children had never ceased to belong to the family, these goods would have continued their own property (p. 112).

edict, would have gone entire to him; and these grandsons, being the only persons in such case prejudiced by the possession of goods obtained by the father, were therefore the only persons with whom he made a *collatio bonorum*;—this was the only case in which grandchildren came in along with the father as partakers in the succession of the grandfather.

Q. Did children given to be adopted (*qui in adoptionem se dederunt*, § 10), or emancipated children who had become *adrogati*, obtain the possession of goods *unde liberi* in the succession of their natural father?

§ 10. A. No: they were not considered by the prætor *sui hæredes*, if still members of their adopted family at the time of the natural father's death; for if the prætor found them members of an adopted family, he was obliged to give them the same rights in the succession of the adopted father as natural children had therein: nor could he consider them as belonging to two families at once (1). But as it was only their being members of another family at their father's death which hindered them from succeeding to him, the prætor admitted them as *sui hæredes* of such natural father, in case their adopted father emancipated them before their natural father's death (2).

Q. Why was it required that their emancipation should precede the death of their natural father?

§ 10. A. Because if their adopted father had had the power, by emancipating after the death of the natural father, to confer rights in the succession of the latter on the adopted children, he would have possessed the unjust power of leaving the *hæreditas* to the *agnati* of such natural father, or of taking it away from them at his pleasure.

Q. Could the person adopted, when emancipated by his adopter, claim in the succession of the adopter the possession of goods *unde liberi*?

§ 11. A. No: the child emancipated by its natural father

(1) He could only grant them the possession of goods *unde cognati* in the third degree; that is, failing *sui hæredes* proper, or considered so by the prætor, and *agnati* (§ 13).

(2) The emancipation of adopted children entitled them to be admitted by the prætor to a share in the succession of their natural father, because it put them not only out of the power of the adopted father, but quite excluded them from the adopted family.

was allowed to claim in his succession the possession of goods *unde liberi*, because, notwithstanding the dissolution of the civil bond, he was still united with his natural father by ties of blood,—still the child of the person whose family he had left; but when an adopted child left the adopted family, he could no longer be considered in any respect as one of the children of his adopted parent, because emancipation deprived him of that title, which was the mere legal consequence of adoption.

Q. For certain reasons it seems that after emancipation the possession of goods *unde liberi* was refused to the adopted child, but allowed to the natural child: now, were there similar reasons which made it necessary after emancipation to refuse possession of goods *contra tabulas* to the adopted child, whilst it was allowed after emancipation to the natural child?

§ 12. A. Yes: for the possession of goods *contra tabulas* and *unde liberi* were two new methods pursued by the prætor for the purpose of bestowing the *legitima successio* on the same persons and according to the same rules, but under different circumstances. The first was pursued when there was a testament in which a *suus hæres*, or a person considered as such, according to the rules given above, was neither appointed nor disinherited according to the necessary forms; the second was pursued when there was no testament at all.

Q. According to what has just been said, it follows that an adopted child emancipated after the death of his father lost two successions: that of his natural father, on account of his position in the adopted family at his natural father's death, and that of his adopted father, who by the emancipation deprived the adopted child of all rights in the adopted family: now what did Justinian do to avoid this?

§ 14. A. Justinian deprived adoption of its chief effect, by decreeing that the party adopted should continue a member of his natural family, and should not pass into the adopted family unless the party adopting him were an ancestor (p. 32). But as Justinian allowed the original effects of adoption to be thus curtailed for the sole purpose of preserving the adopted party's right to the *hæreditas* of his natural father, it followed, that if the person adopted had no possible rights in the *hæreditas* of such natural father, adoption must have its full effect. Thus, if the person adopted was a grandson, whose father was still a member of the family of the grandfather, he

passed into the family of his adopter, because, not being directly under the power of the natural pater-f., he was not his *suus hæres*.

Q. Did Justinian exclude one adopted by an *extraneus* from all rights in the succession of the adopter?

A. Although the person adopted, who did not become a member of the adopter's family, could not be considered his *suus hæres* (proper), still Justinian called him to the *successio ab intestato*, in like manner as if he had been a natural child, and allowed him an equal share with the natural children. But such adopted person never succeeded to his adopter except *ab intestato*; if excluded from the testament he could not claim, as against it, the possession of goods *contra tabulas*, nor could he prefer any plaint of *inofficiositas* (1).

Q. We have seen who were the *sui hæredes* (properly so called), who were considered *sui hæredes* by the prætor. Now explain who were considered such according to the Constitutions?

§ 15. A. The children and grandchildren of the daughters of the deceased. These children, being members not of their mother's family but of their father's, could not be *sui hæredes* (proper) of their maternal grandfather; hence the prætorian law called them to the *hæreditas*, but only in the third order as *cognati*. Under the emperors Theodosius, Valentinian, and Arcadius (A.D. 389), however, the children of a daughter were permitted to represent their mother in the succession of their maternal grandfather (t. 4, § 1).

Q. Did the daughter's children or grandchildren absolutely exclude the *agnati*, and when they came in together with *sui hæredes*, did they take the whole portion which would have come to their mother?

§ 16. A. According to the Constitution of Theodosius, the daughter's children, who were preferred to the *agnati*, were bound to leave a fourth of the *hæreditas* to such *agnati*; but Justinian abolished this provision, being unwilling that collaterals should have any share in a succession so long as there were any lineal descendants, even through daughters.

According to a second provision of the same Constitu-

(1) The adopter was not even bound to leave to the one of three male children (*ex tribus maribus*) given in adoption, the fourth, which was secured by the Sc. Sabinianum. No reason is given for this provision. The date of the Sc. is A.U.C. 914 (circa).

tion, the daughter's children took only two-thirds of the portion which their mother, if alive, would have had, whenever such children came in along with *sui hæredes* (proper). This provision remained part of Justinian's code, and when the daughter's children succeeded to the entire share of their mother, it was only by virtue of Novella 118 (which changed the order of succession laid down by the Twelve Tables).

Q. Were persons who, though not *sui hæredes* (proper), were called as such by the Constitutions, *hæredes necessarii*?

A. The probability is, that they did not become *hæredes* until they had so expressed their intention. For on the one hand, not being under the power of the deceased, they could not be *hæredes necessarii*, except on the authority of some definite law: on the other hand, Justinian, in speaking of the daughter's children who excluded the *agnati*, assumes that they only acquired the *hæreditas* by accepting it (*is adeunetibus* § 15).

TITLE II.—OF THE LEGAL (1) SUCCESSION OF AGNATI.

Q. When are the *Agnati* called to a succession?

Pr. A. *Agnati* are called in the second order, that is, in default of *sui hæredes*. Such was the order settled by the Twelve Tables: and so it continued to be under the new law, the only effect of which was to include within the *sui hæredes* more persons than were included by the Twelve Tables.

Q. What is meant by *Agnati* here?

§ 1. A. Generally, the term *Agnati* includes all the members of the same family; that is, all the relations, who, if the common parent were still alive, would be under his power. In this sense the descendants, or *sui hæredes* of an individual, are his *agnati*. But a special name and rank having been conferred upon them by reason of their dependence and joint interest with the deceased, the term *agnati* must be taken to include only *agnati* in the collateral line—only those who, though not members of the particular family of the *de cuius*, and not under

(1) *Agnati* are called *hæredes*, or legal successors, because the *hæreditas* passes to them by law (*lege*), as contradistinguished from *cognati*, who succeed only by the prætor's edict.

his special power, are still, like him, dependent on a general family, which the common ancestor, if still living, would have had under his power (pp. 42, 155). Thus, two brothers, born of the same father, are *agnati* (proper), provided neither of them has ceased to belong to his father's family, by emancipation or otherwise. Adopted children are also *agnati* (§ 2), not only with those who are subject to the adopter, but also with all collateral *agnati* of such adopter.

Q. To which of the *agnati* did the *hereditas* pass by the law of the Twelve Tables?

§ 5. *Pr. A.* It passed to that *agnatus*, or those *agnati* who were nearest in degree, without any distinction of sex.

Q. But was any distinction introduced?

§ 3. *A.* The Prudentes, in order to keep the goods in the family of the deceased, divided the *agnati* into *consanguinei* and *agnati* (proper). The name *consanguinei* denotes *agnati* of the second degree; that is, brothers and sisters of the deceased, both natural and adopted: to these, first of all, the *hereditas* passed. In default of *consanguinei*, the succession devolved on the *agnati* of lower degree, who were *agnati* (proper); amongst whom no women were included, for no woman beyond the second degree succeeded any member of her family. Hence Ulpian and Paul always limit *agnati* to males; and women, leaving no brothers or sisters *consanguinei*, were succeeded by certain *agnati*, to whom they could not themselves succeed except in the third order, as *cognati* (t. 5).

Q. Was this distinction retained by Justinian?

§ 3. *A.* No: Justinian held that the *hereditas* should devolve on the *agnati* without distinction of sex.

Q. Mention the various alterations which from time to time enlarged the number of persons included in the order of *Agnati*.

§ 4. *A.* Anastasius (A. D. 498) at first confined the class *Agnati* to emancipated brothers and sisters, and they, notwithstanding their *diminutio capitis*, succeeded along with the *agnati* (proper), with a deduction (a fourth, t. 5, § 1). This benefit was not extended to the children of an emancipated brother—they continued to be mere *cognati*. Justinian (A. D. 528), included within the *agnati*, first, brothers and sisters *uterini* (1): then (A. D. 532) the children of

(1) Brothers and sisters *germani* are those born of the same father and mother: *consanguinei* those who had the same father

sisters, and, no doubt, also the children of brothers *uterini*, but he did not include the descendants of inferior degree. Lastly, the emperor, in a revised code, dated Id., Oct., A. D. 534, called to succeed as *agnati*, emancipated brothers and sisters, without any deduction, as well as uterine brothers and sisters, nephews and nieces, being children either of an emancipated brother or sister, or of an uterine brother or sister. Hence every *cognatus* in the second degree was included within the *agnati*; and in the third degree, all were included except uncles and aunts of the deceased.

Q. Was the doctrine of representation and division *per stirpes* applicable to successions passing to *agnati*?

§ 4. A. No; not before the Novella 118. Till then, each one succeeded personally, and the nearest *agnatus* necessarily excluded the children of an *agnatus* of the same degree, who had died; e. g., the brother of the deceased necessarily excluded his own nephews born of another brother.

Q. At what period of time was it necessary, according to law, that a person claiming the *hæreditas* should be the nearest *agnatus*?

§ 6. A. At that period when it is ascertained the deceased will have no *hæres* by the testament; for it is then the succession *ab intestato* arises. It therefore often happened, when the deceased left a testament, that an *agnatus*, though not the nearest at the time of the decease, became the *hæres*: for that purpose nothing further was required than that a person nearer in degree should die before the testamentary *hæres* renounced the *hæreditas*, or before anything happened to avoid the testament.

Q. If the nearest *agnatus* renounced the succession, or died before having accepted it, did the *successio legitima* devolve on the *agnatus* next in degree?

§ 7. A. The law of the Twelve Tables did not sanction such devolution from degree to degree; in case the nearest *agnatus* did not take up the *hæreditas* offered to him, no other *agnatus* could, as such, take it up (1); but

only: *uterini* those who have the same mother only. Brothers *uterini* could not be *agnati*, because the children do not become members of their mother's family, but of their father's.

(1) But the prætors called as *cognati* those who could not take advantage of their rights as *agnati*.

Justinian mitigated the severity of this rule, and allowed the *hæreditas* to devolve amongst *agnati*, in like manner as, by the prætorian law, it devolved amongst *cognati*. Thus the most distant *agnatus* always took precedence of all *cognati*, however near; for the priority of degree gives only preference to one person over another when both are in the same order.

Q. Who succeeded to emancipated children when there were no *sui hæredes*?

§ 8. A. An emancipated person had no *agnati*. Their position was like that of freedmen, and accordingly, the place of the *agnati* was occupied by the patronus, who, in default of *sui hæredes*, succeeded in the second order. This patron was the pater-f., or the purchaser, according as the child had been emancipated, with or without a trust clause (B. 1, t. 12, § 6): but it was always the emancipating ancestor when, as in Justinian's time, emancipation had come to be considered in its results, as made with the trust clause (*quasi contracta fiducia*).—To this patron the succession of the emancipated person devolved, in default of *sui hæredes*, until Justinian postponed him to the brothers and sisters of the deceased.

Q. Whilst the filii-f. had nothing of their own, it is clear that they could have no *hæredes*. But after the different *peculia* were introduced did they then become entitled to leave a *hæreditas ab intestato*?

A. No: and even when the filii-f. had obtained the right of disposing by testament of their *peculium castrense* or *quasi castrense*, they had no *hæreditas ab intestato*. When the filius-f. died, having made no testament, the *peculia* reverted to the pater-f., not as an *hæreditas*, but by virtue of his *potestas*, and as part of his property, i. e., *jure communi*. Under the emperors of Constantinople all goods derived by a filius-f. from the mother, or through any of the maternal line (in which, as in case of the *peculium adventicium*, he retained the bare property), formed a special *hæreditas*, which devolved *ab intestato*: 1. To his children or issue; 2. To his brothers and sisters; 3. To his father and his other ancestors, according to the degree in which they stood. Justinian subjected to the same course of devolution the *peculium castrense* and *quasi castrense*: 1. To the children of the filii-f.; 2. To his brothers and sisters; 3. In default of issue and of brothers and sisters (*nullis liberis vel fratribus superstitis*, B. 2, t. 12, Pr.), the pater-f. was called to the property *jure communi* (*Ibid.*), that is to

say, according to Theophilus, by the right of paternal authority, and not by right of succession.

TITLE III.—OF THE SC. TERTULLIANUM.

Q. Could the mother succeed her children, or the children the mother?

A. By the Twelve Tables, in which, not natural but civil relationship (*agnatio*) was the only thing regarded, neither mother nor children succeeded each other, except in one case, viz., when a mother was subject to and a member of the family of her husband (*in manu*) (1). For the children being members of their father's family, and not of their mother's, were never her *sui heredes*; and the woman continuing generally (and in later times always) a member of her father's family had no *agnatio* with her children, who were of *their* father's, that is, *her* husband's family.—The prætor, it is true, allowed the mother and her children to succeed each other, but only as the nearest *cognati*, by granting them *possessio bonorum unde cognati*; but the nearest *cognatus* came in only in the third order in default of *sui heredes* and *agnati*.

Q. How was the system relaxed?

§ 1. Pr. A. Claudius first offered the *hereditas legitima* (i. e. the right to succeed according to the civil law as *agnata*), not to all, but to one mother in order to console her for the loss of her children. Later (§ 2) a Sc. *Tertullianum* passed in the reign of Antoninus Pius (A. D. 158), gave generally a mother the right to succeed to her *intestate* child, provided that she had given birth to three children, and was a free born woman, or to four if she was a freed woman. But the emperor sometimes granted the same privilege to mothers who had not had the required number. Theodosius (§ 4), and after him Justinian, made this privilege a general rule, and called the mother even of a single child to the succession.

(1) A woman passed into her husband's *manus*: *usu, furreo, coemptione* (p. 20), and was classed as his daughter and sister of her children.—Observe, a woman might be *mancipated* without *coemptio*: a woman *in manu* by *coemptio* was not *in loco servæ* to her husband; she merely changed her family; but a woman *mancipata* was *in loco servæ*:—the difference arising from this, that the same words were not used in the form of *mancipatio* as in that of *coemptio* (Gaius, 1, § 114, 138, 128, p. 234).

Q. Was the grandmother called to enjoy the same benefit as the mother?

§ 2. A. No: this benefit was confined to the mother.

Q. Was not the mother sometimes deprived of the benefit of the Sc. Tertullianum?

A. Yes: she could not succeed her child if it died under age, and she had neglected to demand a tutor for it, or to have a tutor, when excluded or excused, replaced within the year.

Q. Who are preferred to the mother according to this Sc.?

§ 3. A. The mother was reckoned by it amongst the *agnati*; consequently she came in only in default of *sui hæredes*, or of persons filling that rank. The mother did not succeed her deceased daughter if she had any children, though they were not *sui hæredes*; for the Sc. Orphitianum interfered (see next title).

Q. Amongst the *agnati*, or those ranked as such, did any come in before or jointly with the mother?

§ 3. A. When the child had become *sui juris* by emancipation (1), the mother was excluded by the father, whether he succeeded by the civil law as emancipator, or by the prætorian law as son of the emancipating grandfather. But the mother excluded the emancipating grandfather, if he was alone, that is, if the father was dead: but if the father was alive, the grandfather succeeded, for if the mother had been preferred to the grandfather, she would herself have been excluded by the father, who would have been excluded by the grandfather; and therefore, as the grandfather could not be excluded, it was simplest to say, that if the father was alive, the grandfather was preferred to the mother.

When the child had become *sui juris* without *diminutio capitis*, there were no male ancestors by the father's side; it might seem, then, that the mother, as the nearest *agnata*, should exclude all the other *agnati*; nevertheless, she came in after brothers, and jointly with sisters of the deceased, by the same father. If there were a brother, and one or more sisters all by the same father, they divided the succession between them to the exclusion of the mother.

The hæreditas devolved on the mother if those preferred to her refused; devolution was always allowed in this case.

(1) When the Sc. was passed, the *filii familias* had no *hæreditas legitima*, therefore the child must be assumed to be *sui juris*.

Q. Was the effect of the *Sc. Tertullianum* ever suspended in favour of certain *cognati*?

A. Yes: when there was a son or a daughter of the deceased in an adopted family at his death, or when the succession in question was that of a grandson who continued in the grandfather's family after the emancipation or adoption of his father, this *Sc.* did not apply, so that the mother, as *cognata* in the third order, succeeded jointly with the children in one case, and the father in the other; not, observe, to the *hereditas*, but to the *possessio bonorum*, for they were all *cognati* of the first degree. But when there was an *agnatus* who would exclude all the *cognati*, i. e. (in the two supposed cases), the children and the father, the *Sc.* applied, because these last could not be injured, and the mother was preferred to such *agnatus*.

Q. Did the rights of the mother continue till Justinian's time the same as they were by the *Sc. Tertullianum*?

§§ 4, 5. A. No: For by certain Constitutions a third was granted to mothers who had not the required number of children; and a third was withdrawn from those who had the requisite number, and given to certain *agnati* (1). Justinian abolished these distinctions, and declared that the mother should succeed to the whole, in preference to all the *agnati*, except those specified in the *Sc. Tertullianum*, viz. the father, and brothers, and sisters by the same father, to whom the emperor added brothers and sisters by the same mother. If there were any brothers or sisters, whether by the same father or not, Justinian admitted them along with the mother, and the succession was thus divided: if there were sisters only, the mother took half: but if there were one or more brothers, either without or with sisters, the succession was divided *per capita*, and the mother had only an equal share with the others.

Q. Did the mother succeed by the *Sc. Tertullianum* to children not born in lawful wedlock?

§ 7. A. She succeeded to all her children, even though their father was uncertain (p. 24).

TITLE IV.—OF THE *SC. ORPHITIANUM*.

Q. On the other hand, were not the children allowed to succeed their mother?

Pr. A. Yes: by the *Sc. Orphitianum* (A.D. 178), the sons

(1) The uncle, his sons, and grandsons.

and daughters, whether subject or not to another, were preferred to all the *consanguinei* and *agnati* of the deceased woman.

Q. Were they also preferred to the mother of the deceased?

§ 1. *A.* Not by the Sc. Orphitianum; for it called children to the mother's succession only where the old law excluded them, on the ground of their not being either *sui heredes* or *agnati* of the deceased woman. Hence the children who succeeded by the Sc. Orphitianum, and the mother who succeeded by the Sc. Tertullianum, succeeded jointly. This joint succession was abolished by the emperors Gratian, Valentinian, and Theodosius, who gave the preference to the children of the deceased woman.

Q. Did the grandchildren as well as the children succeed by this Sc. Orphitianum?

§ 1. *A.* No: it called only the sons and daughters and not the grandchildren. Later Constitutions, however, allowed the grandchildren to succeed their grandmother (p. 205).

Q. Were the rights of succession allowed by the Sc. Tertullianum and Orphitianum lost by the *minima diminutio capitis* (1)?

§ 2. *A.* No; but there was a difference between new (*novæ*) *hereditates* and those claimed under the Twelve Tables. The latter rested entirely on family rights, and were lost by the *minima d. c.*; whereas the former, resting on ties of blood, survived the loss of family rights.

Q. Did the Sc. Orphitianum apply to children *vulgo concepti*, called *spurii*?

§ 3. *A.* Yes: it allowed such children to succeed their mother, as it did those born in concubinage or lawful wedlock. But Justinian allowed one exception in the case of *spurii* born of a mother *illustris*, who had other children born in lawful wedlock: such *spurii* were entitled to nothing from their mother, either by gift *inter vivos*, or by testament *ab intestato* (2).

(1) They were lost by the *maxima* or *media*; for no one could succeed even by these Sc. unless he was a citizen, because the *hereditas* was a civil right.

(2) The father, not the mother, had *legitimate* and *natural* children. When the bond of connection was *civil*, they were *legitimate*; when by blood they were *natural* children. Hence emancipation transformed *legitimate* into *natural* children, for they left their father's family: those born *ex concubinato* became

Q. If the *hæreditas legitima* was proffered to several jointly, and some either refused it, or died, or became incapable before they accepted it, what became of their portion?

§ 4. A. Such portion accrued to the *cohæredes* who accepted, or to the *hæredes* of such *cohæredes* as died after acceptance of the *hæreditas*, and before the accruer or the *jus accrescendi* arose (p. 179).

TITLE V.—OF THE SUCCESSION OF COGNATI.

Q. When did the *cognati* succeed?

Pr. A. In the third order, *i. e.*, after the *sui hæredes* and those ranked as such, and after the *agnati* and those ranked with them. This order was created by the prætors, in order to include those relations who were excluded by the rigour of the civil law (t. 9, *post*).

Q. What persons were admitted by the prætor as *cognati*?

A. The prætor admitted all the relations, without any preference of one over the other, except what arose from nearness of degree to the deceased (*proximitatis nomine*), and without preference of one relation because of his being of the same family with the deceased: for the only thing regarded in case of *cognati* was the tie of blood. Hence those who by a *minima d. c.* were no longer *agnati* of the deceased, and therefore could not be called amongst the *legitimi hæredes* (1), might come in amongst the *cognati*. The same rule applied to *collaterals* (2) related through females.

legitimate by *legitimatio* (p. 30). But the mother, whose children are connected with her only by blood, has only *natural* children, who were all admitted by the prætor to the *possessio bonorum unde cognati*; but when the civil law admitted them to the *hæreditas*, they were so far deemed *legitimate*.

(1) The prætor called those in the position of *sui hæredes* who had suffered *minima d. c.* to succeed; but an *agnatus* who had suffered this *d. c.* could not remain in the second rank except by a special law. Thus, Anastasius allowed emancipated brothers and sisters, and Justinian allowed nephews and nieces, to retain the place of *agnati* (B. 3, t. 2).

(2) § 2 speaks only of *collaterals*, because ancestors and issue, through females, were provided for by *Sc. Tertullianum* and *Orphitianum*.

Q. Could children, members of an adopted family, succeed their natural father as *cognati*?

A. Yes; because regard was had, not to the ties of blood but of family.

Q. Might an adopted person succeed as a *cognatus* his adopted *agnatus*?

§ 3. A. Yes: so long as the *agnatio* arising out of the adoption continued, the person adopted was both *agnatus* and *cognatus* of the members of the adopted family; for every *agnatus* must be a *cognatus*.

Q. But as this fictitious *cognatio* ceased with the *agnatio* of which it was a mere result, what was the use of reserving a place in the third order for the adopted person, for he could not claim it after he had ceased to be a member of the family; and whilst a member, he came in as *agnatus* in the second rank?

A. The reason is this: before Justinian's time there was no devolution from one *agnatus* to another, so that in case the nearest *agnatus* to whom the succession descended, and who excluded all the others, would not or could not succeed, the other *agnati*, to whom the succession did not devolve, had an interest to appear as *cognati*.

Q. Could children *vulgo concepti* succeed each other?

§ 4. A. Such children were not *agnati* to each other; for, their father being unknown, their only relations were through females, and they were not members of the same family; but they succeeded as *cognati*.

Q. Did the *prætor* admit *cognati* of any degree to succeed?

§ 5. A. No. The *prætor* admitted none beyond *cognati* of the sixth degree, and amongst those of the seventh degree the children of the male and female second cousins. Herein the rank of *cognati* differs from that of the *sui heredes*, and the *agnati* who were called to the *hereditas legitima* or to the *possessio bonorum unde legitimi*, though of the tenth or even lower degrees.

TITLE VI.—OF THE DEGREES OF RELATIONSHIP.

Q. Explain the different degrees of relationship.

Pr. A. There are two lines of relationship: the *direct* line, subdivided into the upper, or ascending, and lower, or descending, and the *collateral* line. The direct line contains both above and below relations of the first degree:—

In the first degree: above, father and mother; below, son and daughter.

In the second degree: above, the grandfather (*avus*) and grandmother (*avia*); below, the grandson (*nepos*) and the granddaughter (*neptis*); in the collateral line, the brother and sister.

In the third degree: above, the great-grandfather (*proavus*), the great-grandmother (*proavia*); below, the great-grandson (*pronepos*), and the great-granddaughter (*proneptis*); in the collateral line, the son and daughter of the brother and sister, *i. e.*, nephew and niece (*fratris sororisque filius, filia*), the uncle by the father (*patruus*), the uncle by the mother (*avunculus*), the father's sister (*amita*), the mother's sister (*matertera*), *i. e.*, the aunt.

In the fourth degree are: above, the great-great-grandfather (*abavus*), the great-great-grandmother (*abavia*); below, great-great-grandson and-daughter (*abnepos, abneptis*); in the collateral line, the grandson and granddaughter of the brother or the sister, the great-uncle, and great-aunt by the father (*patruus magnus, amita magna*), *i. e.*, the brother and sister of the grandfather, the great uncle and great-aunt by the mother (*avunculus magnus, matertera magna*) *i. e.*, the brother and sister of the grandmother; lastly, the cousins, male and female (1).

In the fifth degree are: above, the great-grandfather's or-mother's grandfather (*atavus*), grandmother of the same (*atavia*); below, the grandson or-daughter of the great-grandson or-daughter (*atnepos, atneptis*); in the collateral line, the great grandson and-daughter of a brother and sister, the great-grandfather's brother or sister (*propratus, proamita*); the great-grandmother's brother or sister (*proavunculus, promatertera*); the son and the daughter of the first cousin, male or female; the cousin of the father or the mother, *i. e.*, the son or daughter of the great-uncle or aunt by the father's side, or of the great-uncle or-aunt by the mother's side (2).

(1) Cousins, male and female, are called generally *consobrinus, consobrina*; but in strictness this term applies to the children of two sisters; *patrueles* to the children of two brothers; and *amitini* to the children of a brother and of a sister,

(2) The cousin of my father and of my mother (my cousin once removed) was called *propior sobrino*, because he was one degree nearer than his own son, my *sobrinus*. The children of cousins (*consobrimi*) are second cousins to each other (*sobrimi*).

In the sixth degree are : above, the great-grandfather's great-grandfather or-mother (*tritavus, tritavia*); below, the great-grandson or-daughter of a great-grandson or-daughter (*trenipos treniptis*), in the collateral line the great-great-grandson or-daughter of the brother and sister; the brother and sister of the great-great-grandfather (*abpatruus, abamita*); the brother and sister of the great-great-grandmother (*abavunculus, abmatertera*); the son and the daughter of the great-grand-uncle or aunt by the father's side; of the great-grand-uncle or aunt by the mother's side; also second cousins, i. e., the children of brothers or sisters *patrueles* of *consobrini* or *amitini* (1).

Q. Beyond the sixth degree, was there any particular name for each of the relations?

§ 7. A. No: it was thought sufficient to count them by generations (p. 94).

Q. Did the tie of blood between slaves entitle them to succeed each other after they had become free and citizens?

§ 10. A. The relationship between slaves was disregarded by the civil and the prætorian law, or rather, no right of succession was acquired by such relationship (p. 119). But Justinian held it sufficient to entitle children to succeed their father and mother, and also to succeed each other (p. 219).

Q. Was the nearest in degree always entitled to the succession?

A. No. A relation more distant in degree sometimes came in jointly with another less distant, and sometimes even excluded him. For it was only when there was no *sui hæres* nor *agnatus* that nearness of degree entitled a man to the preference. Thus, grandchildren being *sui hæredes* were preferred to brothers and sisters of the deceased, though they were both in the same degree, and even to the father and mother, who were in the first degree.

TITLE VII.—OF THE SUCCESSORS OF FREEDMEN.

Q. Who succeeded freedmen by the Twelve Tables?

(1) I. e., the son and daughter of the father's or the mother's cousin (*sobrinus, sobrina*), the grandson or grand-daughter of the cousin-german by the father's side, the grandson or grand-daughter of the cousin-german by the mother's side.

Pr. A. When the freedman died *testate*, the *institutus*; when he died *intestate*, first, the *sui heredes*, and in default of them, the patron and his children, who stood for the *agnati*; hence the freedman, to exclude his patron, had only to appoint a *heres*, or to adopt a stranger who would become his *suus heres* (1).

Q. Did not the prætor's edict remedy this?

§ 1. *A.* Yes; for if a freedman died *testate*, leaving the patron nothing, or less than half his *successio*, the patron might have *possessio bonorum contra tabulas* of the half; unless, indeed, the *institutus* was the testator's natural child. If a freedman died *intestate*, leaving none but adopted children as his *sui heredes*, the patron might also have *possessio bonorum* of half.—Natural children, although emancipated, excluded the patron; unless, indeed, they were legally disinherited.

Q. Had the patroness and the patron's children the same rights in the freedman's *successio* as the patron?

§ 2. *A.* By the Twelve Tables, the patron's children, in default of their father, had the same rights as he had: the patroness had the same right to succeed her freedman as a patron had. But the prætorian edict, though it allowed the *possessio bonorum* as above to the patron and his male children, did not allow it to the patroness and the patron's female children. The *lex papia poppæa*, however, made an exception in favour of such women as had a certain number of children.

Q. Did not the *lex papia poppæa* entitle the patron sometimes to come in with the freedman's natural children?

§ 2. *A.* Yes: the patron took an equal share with such children when any freedman died either *testate* or *intestate*, leaving fewer than three children, and a sum of 100,000 sesterces. A patroness, if freeborn, and the mother of three children, had the same right.

Q. What was Justinian's system?

§ 3. *A.* When a freedman died *testate*, a distinction was made between him who was *minor* and him who was *major centenarius* (2). If *minor*, the patron had only the sum

(1) By the old law, freedwomen had no *sui heredes*; and women *sui juris* were under perpetual tutela, and required the authority of the tutor (who was the patron) to make a will. Hence, the patron was not likely to lose the freedwoman's succession (Gaius 3, 43; Ortolan, t. 1, 236).

(2) A *centenarius* is one who has 100 aurei, *aureus* = 100 sesterces.

bequeathed to him: if *major*, the patron might have *possessio bonorum contra tabulas* of a third, not of a half, as heretofore (1). When the freedman died *intestate*, whatever might be his fortune, the patron succeeded only in the second rank (*ordo*), as under the Twelve Tables, and never came in with any child of the deceased.

Q. Do these rules of Justinian as to a freedman and his children apply to a freedwoman and her children?

§ 3. A. Yes: and to the patroness as well as the patron.

Q. In default of patron or patroness, did their children succeed the freedman?

§ 3. A. Yes: Justinian admitted not only their children, but their collateral relations to the fifth degree, and that to the exclusion of all the collaterals of the freedman; because (p. 217) relationship through slaves benefited no one: except, indeed, after Justinian's time, the freedman's children, who, though conceived before the enfranchisement, succeeded their father, and excluded the patron.

Q. When the patron's issue succeeded the freedman, did those more remote come in as representatives with those less remote?

§ 3. A. No: the nearest of the issue excluded the more remote, and those of equal degree came in jointly, and divided the succession equally—*per capita*, and not *per stirpes*.

Q. Did the rules of the old law as to freedmen succeeding apply to all freedmen?

§ 4. A. No: only to those being Roman citizens: *Latini Juniani* had no *heredes*, because at death they were considered as never having been free, and because all the goods acquired by them were acquired for the patron, and therefore formed part of his succession, if he had died previously (2). After Justinian abolished the distinction between

Thus, the 1000 aurei of the *lex papia* (passed in the reign of Augustus) were reckoned by Justinian equal to 100 in his time.

(1) But Justinian did not allow the patron to claim the *possessio bonorum*, so as to prejudice the freedman's natural children; for it was only in default of them, or when it was impossible they could succeed by obtaining the *possessio unde liberi* or *contra tabulas*, or by preferring a plaint of *inofficiositas*, that the patron could demand his third. This third was clear of all charges, even for the benefit of the children of the deceased; legacies and trusts were to be paid by the other *instituti* (§ 3).

(2) The goods of the freedmen *Latinus* did not therefore pass to the deceased patron's children, but to his *heredes*. Now, as his

freedmen, the system established by him regulated the devolution of every freedman's property (B. 1, t. 5).

TITLE VIII.—OF THE ADSIGNATIO OF FREEDMEN.

Q. Although in general a freedman's goods devolved jointly on the deceased patron's children of equal degree, was not the patron entitled to assign the whole of the goods to one of his children?

Pr. A. Yes: he was allowed, by a Sc. A.D. 45, to assign the freedman to one of his children, who was to accept the *hereditas* alone, as if he were sole patron of the deceased: nor did the other children recover their rights of succession until the particular one died childless.

Q. To whom might the freedman be thus assigned?

§ 1. A. A man might assign any number of freedmen or freedwomen to his son or grandson, to his daughter or grand-daughter, provided they still continued under his power: and that even though the grandchildren would of necessity become subject to their father.

Q. Did the emancipation of the *filius-f.* to whom the freedman had been assigned annul the assignment?

§ 2. A. Yes: an assignment could benefit none but a *filius-f.* But it continued valid when made jointly to a *filius-f.* afterwards emancipated, and to another *filius-f.* who continued subject to the patron.

Q. Did this sort of assignment require any solemnity?

§ 3. A. No: it was enough for the patron to manifest somehow his intention to assign by parol, or by writing, or even by a sign; moreover, it might be *inter vivos*, or by an act of last will.—Lastly, an assignment once made was revoked by the patron manifesting his intention so to do.

TITLE IX.—OF THE POSSESSION OF GOODS.

Q. Define the *possessio bonorum*.

A. It is a right, granted by the prætor, to succeed to the aggregate of rights (*universitas*) left by a deceased person, and to represent him (1).

children were not of necessity his *heredes*, the Sc. Largianum (A.D. 42) decreed that they should be preferred to any *heredes extranei*, to whom the patron's *hereditas* would have gone; unless, indeed, the children had been formally disinherited.

(1) It arose thus: It was the prætor's duty to deliver and secure to the *heres*, in case of dispute, possession of the goods of the deceased. At first he simply executed the law, by giving the

Q. For what purpose did the prætor create this *possessio*?

A. Not merely to amend, but to confirm and complete the old law.

Q. Give instances in which the prætor amended it.

Pr. A. Thus, when a man died intestate, he granted the *possessio unde liberi* to children who, in consequence of a *diminutio capitis*, were no longer *sui hæredes* by the civil law (p. 201); when a man died testate, he granted the *possessio, contra tabulas* to an emancipated child, omitted by the pater-f. (B. 2, t. 13), *secundum tabulas* to a *postumus alienus*, who, before Justinian's time, could not have been *institutus* (1).

Q. Give instances in which he confirmed it.

§ 1. A. When he granted the *possessio* to persons already called to the *hæreditas*. Thus: *possessio unde liberi* was granted, not only to children who had ceased to be of the family, but also to those who, continuing members, were still *sui hæredes*; so *possessio unde legitimi* was granted to *agnati*, and to those called to the *hæreditas* by the civil law in the second rank (*ordo*); so when there was a verbal testament, *possessio secundum tabulas* was granted to those well instituted according to civil law (B. 2, t. 10, *fin. n.*).

Q. What was the use of granting the *possessio* when the hæres had been already called by the civil law?

A. He thus became entitled to the interdict *quorum bonorum* (B. 4, t. 15).

Q. How did the prætor complete (*dilatate*) the old law as to succession?

§ 2. A. By creating certain ranks of successors, especially the third (*unde cognati*), for the nearest blood-relations. The right of succession, which by the Twelve Tables was too confined, was extended in order to prevent a man dying without a successor (p. 103).

hæres the possession of such goods as came to him by law. Afterwards he granted the possession to certain relations whom the civil law passed by; and sometimes he even set aside the legal *hæres* for other parties who had a prior claim, according to equity and natural law. After the conquest of Italy and the provinces, it was necessary that a new rule of succession should be created for *peregrini* who had no right to the *hæreditas* (proper), i. e., the *quiritarian* ownership; and this was done by the *possessio bonorum*.

(1) Observe, the prætor did not admit to the *hæreditas* any expressly excluded by the law; he only called certain persons whom it had neglected (D. 37, 1, 12, 1).

Q. Were the successors, according to the prætorian law, really *hæredes*?

§ 2. A. No: no man could be strictly a *hæres* except by a law, or some legislative provision, which, like a *senatus consultum*, or an imperial Constitution, established a right. Hence, prætorian successors had not the qualities of *hæredes*, and were only called *bonorum possessores*, *bonitærian*, not *quiritarian* owners; as such, however, they possessed every right, and were liable to every obligation peculiar to a *hæres*, in whose place they stood.

Q. How did the prætor's edict arrange the *possessiomes bonorum*?

A. It followed the Twelve Tables; for first came the *possessio bonorum*, there being a testament; and second, the *possessio*, there being no testament.

Q. Suppose a testament?

§ 3. A. There was, 1. The *possessio contra tabulas*, granted to children omitted from the testament of their father or their paternal grandfather; 2. The *possessio secundum tabulas*, granted to the *hæredes instituti* (p. 121).

Q. Suppose no testament?

§ 3. A. Before Justinian's time there were eight *possessiões*: 1. *Possessio unde liberi* (1), by which the *sui hæredes* proper, and those ranked with them, were called; 2. *Unde legitimi*, by which *hæredes legitimi*, i. e., by the civil law, in default of *sui hæredes*, were called, e. g. the patron and his children; 3. *Unde decem personæ*, by which ten cognati were called in preference to the stranger-purchaser (*extraneus manumissor*) who, having acquired the deceased (*filius-f.*) by *mancipatio*, emancipated him, and so became his fictitious patron (B. 1, t. 12). These ten cognati were related in the first and second degree, viz., father, mother, grandfather, and grandmother paternal and maternal, son, daughter, grandson and granddaughter, brother and sister (2). 4. *Possessio unde cognati* (3), by which the

(1) *I. e., pars edicti unde liberi vocantur, &c.*

(2) This kind of *possessio* (a mere exception from the last) was seldom granted. Generally, children *mancipated* to a stranger-buyer were *re-mancipated* to their father, and enfranchised by him; thus the father, as patron, obtained by the civil law *possessio unde legitimi* before any of the *cognati*. After Justinian's time, as emancipation was always considered to be made *contracta fiducia*, the *possessio unde decem* ceased.

(3) Generally, this *possessio* came third; here it comes fourth, because of the *possessio decem*, which was confined to a particular case.

nearest blood relations were called ; 5. *Possessio tum quem ex familia* (1), by which the nearest member of the patron's family, i. e., his *agnati*, were called ; 6. *Possessio unde patronus patronave*, by which the patron or the patroness of the patron, and their descendants and ancestors were called (2) ; 7. *Possessio unde vir et uxor*, by which the survivor of the husband and wife was called, in case the marriage continued till the death of the *de cuius* ; 8. *Possessio unde cognati manumissoris*, by which the cognati of the patron were called (3).

Q. Did Justinian retain all these *possessiones* ?

§ 4. A. No: he abolished 3, 5, 6, and 8; the *unde decem*, because in his time the emancipation of a *filius-f.* was always made *contracta fiducia*, and so the fictitious title of patron never belonged to a stranger : 5, 6, and 8, because such *possessio* was useless, after the same rule had been laid down in regard to the succession of freedmen, as to that of freeborn men, viz., that the patron's relations should succeed to the freedman as they would to the patron, and in the same order (4), so that each of them, as he was *hæres legitimus*, or *cognatus* of the patron, should have *possessio unde legitimi*, or *unde cognati*, in the goods of the freedman.

Q. After Justinian's changes how many *possessiones bonorum* remained ?

(1) Others say *tum quid*. Justinian abolished this and the following, as being involved in inextricable confusion (§ 5).

(2) The patron is here presumed to be a freedman ; so that the prætor called as successor the *agnati* of the patron if he was born free, and the patron of the patron if he was a freedman.

(3) The various *possessiones bonorum* may be arranged thus :— 1st case. Deceased freeborn and *sui juris* by birth, or by *capitis diminutio* : (a) *unde liberi* ; (b) *unde legitimi (agnati)* ; (c) *unde cognati* ; (d) *unde vir et uxor*. 2nd. Deceased freeborn, emancipated *sine fiducia* : (a) *unde liberi* ; (b) *unde decem personæ* ; (c) *unde legitimi (manumissor extraneus)* ; (d) *unde cognati* : (e) *unde vir et uxor*. 3rd. Deceased freeborn, emancipated *cum fiducia* : (a) *unde liberi* ; (b) *unde legitimi (parens manumissor)* ; (c) *unde cognati* ; (d) *unde vir et uxor*. 4th. Deceased freedman emancipated by one freeborn : (a) *unde liberi* ; (b) *unde legitimi (patronus et liberi ejus)* ; (c) *tum quem ex familia* ; (d) *unde vir et uxor* ; (e) *unde cognati manumissoris*. 5th. Deceased freedman emancipated by another freedman : (a) *unde liberi* ; (b) *unde legitimi (patronus et liberi ejus)* ; (c) *unde patronus et patrona, &c.* ; (d) *unde vir et uxor*.

(4) But not beyond the fifth degree (*vide* 219).

§ 4. *A.* Six. Two, *viz.*, *contra* and *secundum tabulas*, when there is a testament; and four when there is no testament, *unde liberi, unde legitimi, unde cognati et unde vir et uxor* (§ 7). These six are the *ordinary possessiones*, because they are always granted to particular persons in particular circumstances, and in a settled order; there is, however, a seventh *possessio bonorum, uti ex legibus*, granted, both where there is and where there is not a testament, and which has no settled place among the *possessiones*.

Q. Who were called to this *extraordinary possessio*?

A. To it the prætor called all those to whom a law, a Sc. or a Constitution directed that *possessio* should be given, and he called them in the order specified by such law, Sc. or Constitution (1).

Q. Was there devolution in the case of *possessio bonorum*?

§ 8. *A.* The succession devolved from one rank to another (*ordo*), and from one degree to another in the same rank; *e. g.*, when there were several *cognati*, each was called, in default of one or more of them who preceded, and the most remote *cognatus* was always preferred to the surviving husband or wife.

Q. Did not the prætor fix a period within which the *possessio* must be claimed?

§ 8. *A.* Yes: for thus the devolution of the *hereditas* was accelerated; the creditors of the deceased knew to whom they had to look; the time within which they might bring their actions was limited, and it was therefore less easy for them to get put into possession of the goods of the deceased (*vide t. 12*).

Q. What was the period?

§ 8. *A.* One year, when the claimant was a descendant or ancestor, and 100 days when he was a collateral. The time was to consist only of *dies utiles* (§ 10), *i. e.*, it was not to include days on which the person to whom the *possessio bonorum* was offered was prevented from acting, either because he did not know his right had accrued, or because the magistrate was not sitting (*dies nefasti*).

(1) Observe, the *possessio unde legitimi* was granted in a certain order to those called to the *hereditas* by the civil law, and to the *possessio* by the prætor; but in the *possessio uti ex legibus* it was the *possessio bonorum*—not the *hereditas*—which was offered by the civil law: by such *possessio, e. g.*, the patron came in with the children of the freedman, by virtue of *lex papia poppæa*.

Q. What if *possessio* was not claimed by the person entitled within the proper time?

§ 9. A. The right to claim was lost, and it passed to those called jointly with him. If called alone, the right to demand the *possessio* passed to those in the next rank (*ordo*): the same thing happened when, before the period elapsed, the *possessio* was renounced.

Q. What was the form of demanding the *possessio*?

§ 10. A. Formerly the party appeared before the *prætor* and made a formal demand: but even before Justinian the form was abolished. It was enough to show, somehow, the will to accept.

Q. Did it not sometimes happen that those to whom *possessio* was offered according to the edict did not obtain the goods of the *hæreditas*?

A. Yes: that was *possessio bonorum sine re*. *Possessio* was frequently offered to persons already called to the *hæreditas* by the civil law: if such persons were satisfied with their title according to the civil law, and accepted the *hæreditas* without demanding the *possessio*, this right devolved, at the expiration of the time, on the next rank (*ordo*): but if the person on whom the *possessio* thus devolved, demanded it, he got it *sine re*, because the legal hæres was entitled to the (*res*) *hæreditas* in preference to him.

APPENDIX: OF SUCCESSION (AB INTESTATO) ACCORDING TO NOVELLÆ 118 AND 127 (A.D. 543, 547).

Some years after the Institutes (A.D. 540) were published, Justinian abolished the succession rules of the Twelve Tables, which, notwithstanding the changes made by the edict by Sc. and imperial Constitutions, remained.

By Novella 118, the distinctions between the *possessio bonorum* and the *hæreditas*, and between *agnati* and *cognati*, were abolished; thenceforth, there were only three ranks of successors: first, descendants; second, ancestors; third, collaterals.

Q. Explain the new rules of successio?

A. 1. All the descendants, whether emancipated or not, adoptive or natural, male or female, in the first or more remote degree: if they were in the first, they came in *per capita*, i. e., each for an equal share: if in a more remote degree, they came in *per stirpes* (1). 2. Failing descendants

(1) Children did not succeed their father and his relatives, unless the relationship arose from a legal marriage (*justis nuptiis*);

came the ancestors ; but if there were brothers or sisters of the whole blood, each ancestor who had a claim, and such brothers and sisters, came in *per capita*: the ancestor nearest in degree always excluding the more remote. If there were no such brothers or sisters, but two or more ancestors in the same degree, some by the paternal, some by the maternal line, the ancestors of one line took half, and those of the other line the other half. 3. Failing ancestors, there came, first, brothers and sisters of the whole blood ; and failing them, brothers and sisters by the half blood, whether *consanguinei-a* or *uterini-a*. The children of a deceased brother or sister represented their father or mother, and succeeded jointly with the surviving brothers and sisters (1) ; but grandchildren did not represent their parents. Failing brothers and sisters, or children of brothers and sisters, the blood relation nearest in degree succeeded ; if there were several in the same degree they succeeded *per capita*.

Q. Were any persons incapable of succeeding ?

A. Justinian still held heretics to be so.

Q. Did these new rules of succession produce any change in the rules as to *tutela legitima* ?

A. Yes : in accordance with the principle that such *tutela* should belong to the presumptive hæres, it was decreed that if there was no testamentary tutor the *tutela* should belong to the nearest male relations, according to the new rules of succession : the women being still incapable of being guardians, except a mother and grandmother, who might be guardians if they did not marry again, and renounced the benefit of the Sc. Velleianum, which forbade women from binding themselves for others.

TITLE X.—OF THE ACQUISITION OF PROPERTY BY
ADROGATIO.

Q. Define acquisition by adrogatio.

A. It is a mode of acquiring an *universitas*, whereby the adrogator becomes proprietor of everything corporeal and incorporeal belonging to the *adrogatus*.

bastards succeeded their mother (except in case, B. 3, t. 4), and the relations through the mother.

(1) It was only by Nov. 127 that children of a brother and sister of full blood were allowed to come in jointly with the ancestors by representation. *Quære*—whether nephews and nieces, in default of brothers and sisters of the deceased, succeeded *per stirpes*. Probably they did.

Q. Explain the origin of this mode of acquiring.

Pr. A. It was introduced neither by the Twelve Tables nor by the prætor, but by that general assent which constituted the unwritten law, and it was a consequence of that *patria potestas* vested in the *adrogator* by *adrogatio* (B. 1, t. 11).

Q. Did *adrogatio* transfer every single right of the *adrogatus* to the *adrogator*?

§ 1. *A.* No: it did not transfer those which, being due to the patron personally, were extinguished by the *minima d. c., viz.*, the rights of *agnatio* (1) and *obligationes operarum* (2).

Q. Were not the *adrogator's* rights over the goods of the *adrogatus* limited?

§ 2. *A.* Yes: in consequence of the modified effect of the *patria potestas* upon the goods acquired by *filiif.* (B. 2, t. 9); for neither natural nor adoptive parents acquired more than the usufruct of the goods of the *adrogatus*. The *adrogator*, therefore, acquired no property therein unless the *adrogatus* died in the adopted family, leaving no descendant brother or sister; for then the adopted father succeeded like the natural father (B. 3, t. 2, *prop. fin.*)

Q. Did the liabilities of the *adrogatus* attach to the *adrogator* as his claims did?

§ 3. *A.* No (3): the creditors of the *adrogatus* could not sue the *adrogator* directly, but they might do so indirectly in the name of the *adrogatus*. And if the *adrogator* refused to answer for the *adrogatus*, the creditors might seize on the goods of the *adrogatus*, in order to their being sold according to the forms of law.

TITLE XI. — OF HIM TO WHOM GOODS ARE ADJUDGED IN ORDER TO MAKE ENFRANCHISEMENTS EFFECTUAL.

Q. Besides the three modes of acquiring *per universitatem, viz., hereditas, possessio bonorum, adrogatio*, was there not a fourth?

(1) For the *adrogatus* became *agnatus* to every member of the *adrogator's* family; and as he could not be *agnatus* to two families at once, he ceased to be a member of his original family.

(2) *I. e., officiales*, services of duty; and *fabriles*, professional services for his patron's benefit. Most freedmen had a profession.

(3) For though the *pater-f.* had the benefit of any liability incurred by any person to his *filius-f.*, the *filius-f.* could not bind his *pater-f.*, but the prætor allowed him to be sued if he had benefited by the contract (B. 4, t. 7).

Pr. A. The *adjudicatio of goods for the purpose of sustaining enfranchisements*, introduced by a rescript of M. Aurelius.—When a testator in involved circumstances bequeathed freedom to his slaves, and the *hæredes instituti* refused to accept the *hæreditas*, the enfranchisement failed (*caduca*): if, moreover, there was no *hæres ab intestato*, and the treasury refused the succession, the creditors, as there was no successor, were allowed to sell the *bona vacantia* in the name of the deceased (*vide tit. seq.*) Now, by this rescript (1) either all or one of the slaves to whom the freedom was bequeathed, or even a third party, might have the goods adjudged to them, so that they guaranteed the whole debt to the creditors, and agreed to effectuate the enfranchisement.

Q. How did this adjudication affect creditors and freedmen?

§ 2. *A.* The goods having been thus adjudged, could not be sold as *bona vacantia*, because the person to whom they had been adjudged (*defensor idoneus*) was in the same position, with respect to them, as the debtor or his *hæredes*.

The slaves whom the *institutus* was charged to enfranchise, were enfranchised by the *defensor*, and those whom the testator enfranchised directly became free, just as if the *hæreditas* had been accepted by the *institutus*: so that their patron was the deceased (B. 2, t. 24). But (§ 1) on demand of the *defensor*, and with the consent of the slaves whose condition was in question, the adjudication might be under the express condition that the *defensor* should be the patron of all the slaves enfranchised.

Q. Did this kind of *adjudicatio* take place when the deceased had not enfranchised any slave?

§§ 2, 4, 6. *A.* No: it could only be made when it was ascertained that the deceased would not have a successor.

(1) This is the history of the rescript: Virginius Valens, by his testament, gave several slaves their freedom. The *instituti* renounced, the testament was avoided, and the slaves remained slaves. Not only was there no *institutus* by the testament, but there was no successor *ab intestato*, and so the goods would have been sold by the creditors, had not one Popilius Rufus requested that they might be conveyed to him, he undertaking to effectuate all the bequests of enfranchisement, whether the slaves were enfranchised directly or by *fidei-commisum*. M. Aurelius allowed him to appear before the magistrate to have the goods adjudged to him, on condition of his guaranteeing the creditors the whole amount of the debts due (§ 1).

For the object of the rescript was, 1st, to promote enfranchisement; 2nd, to protect the memory of a testator, by preventing his property being sold in his own name. Therefore it applied only when some slave was enfranchised, or when there was no successor, because, if there was one, he would be answerable to the creditors, who would therefore no longer be allowed to sell in the name of the deceased.

Q. When every body competent to succeed had renounced, could there be such an adjudication, though the renunciation might possibly be decreed null by a *restitutio in integrum*, which the prætor might see fit to grant to minors of twenty-five years (B. 2, t. 8)?

§ 5. A. Yes: and in case a *successor* (1) who had refused was restored, he was reinstated in the position he occupied before his refusal; but though he might resume the *hæreditas*, still he was not allowed to reduce to slavery those who, by the adjudication, had become free; for, liberty once granted could not be revoked.

Q. Did the rescript of M. Aurelius apply, unless the deceased had enfranchised slaves by testament?

§ 3. A. The rescript mentions only enfranchisement by testament; but the same benefit was extended to cases in which the enfranchisement was by codicil. It was also extended to enfranchisements made *mortis causâ* and *inter vivos*; for then, the *defensor* being answerable for all debts, no question could arise as to whether such enfranchisements were void, as made in fraud of creditors (§ 6).

Q. Did Justinian add to M. Aurelius' rescript?

§ 7. A. Yes: by a Constitution to be found C. vii. 2, 15, Pr. 1.

TITLE XII.—OF SUCCESSIONS SUBLATE WHICH TOOK PLACE BY SALE OF GOODS, AND OF THE SC. CLAUDIANUM.

Q. Formerly, were there any other modes of acquisition *per universitatem*?

Pr. A. Yes; one was by purchasing a debtor's goods after the order directing a *missio in possessionem*, i. e., a putting into possession for the benefit of creditors (*bonorum emptio*); the other took place under special circumstances, by virtue of the Sc. Claudianum.

Q. When and how did such sale take place?

A. According to Gaius (3, §§ 77—81) and Theophilus, the creditors might demand the sale of goods, either during

(1) *E. g.*, a *hæres ab intestato*, under twenty-five.

the debtor's life, or after his death. During his life: 1. When he fraudulently concealed himself, so as to prevent the creditors from summoning him (*in jus*) before the magistrate (1); or when he was absent, and had left no one to represent him (*nec absentes defenduntur*) (2); or when, being before the magistrate, he refused to plead, and to become a party to the action. 2. When he was condemned, but did not comply with the judgment within the proper time (3). 3. When there had been a *cessio bonorum* by the *lex Julia* (3). After his death, when no one appeared as his *successor*.—In all these cases the creditor or creditors got from the *prætor* a *decretum* which put them into possession of all the debtor's goods; but this *decretum* did not vest the property in the creditors; the *missio* was simply that the goods might be kept as a pledge, and be ready for sale (4), (*missio in possessionem rei servanda causa*); it continued for thirty days when the debtor was alive, for fifteen when he was dead. During that period the sale was advertised (*libellus*) by placards, in this form: "*A., our debtor, is in-*

(1) A suit began by the *in jus vocatio*. The plaintiff summoned the defendant before the magistrate. If the latter did not obey he might be forced. But as no one, even a creditor, could enter a citizen's house, which was his *castle*, the debtor had only to shut himself up to avoid the suit and the judgment. Hence the *prætor* decreed that the plaintiff should be put into possession of the goods of him *qui fraudationis causa latitat* (B. 4, t. 6).

(2) When a *vindez* or *defensor* appeared for the defendant, undertaking to pay the judgment, the suit was against the new defendant. But the *missio* against an absent person was annulled, on good reason being shown.

(3) *Vide* p. 9 as to *addictio*. Instead of the *addictio*, the *lex Julia* allowed the debtor to get rid of the personal constraint by surrendering everything to his creditors. It would have been useless to add any execution on the goods in addition to the cruel treatment allowed to the creditor over the person of his debtor; hence no such execution was used in the early times, except in certain special cases, when the creditor was entitled to seize as a pledge the goods of the debtor. The *prætors*, however, to get rid of personal constraint, introduced the *missio in possessionem*, which allowed the goods of the debtor to be seized in satisfaction; hence *addictio* became less common.

(4) If the party put into possession was resisted, the *prætor* would grant him an *interdict*, or he might call upon the officers of justice. *Per viatorem aut per officialem præfecti, aut per magistratus introducendus in possessionem* (L. 5, § 27 D, *ut in poss. legat*). A certain *infamy* was attached, even after death, to a debtor against whom there had been *immissio*; but the deceased debtor might avoid it by appointing a slave *heres*.

solvent; we, the creditors, are selling his property; let any purchaser appear." Thus, the creditors who had not yet appeared had notice. After such period one of the creditors was chosen by the rest *magister*; and after the lapse of another period, and further advertisements, describing the conditions of sale (*lex bonorum vendendorum*) in this form: "*The purchaser will undertake half the debtor's debts; so that he to whom one hundred solidi are due, shall receive fifty, and he to whom two hundred are due shall receive one hundred,*" such agent (*magister*) adjudged the goods to the party who promised the creditors the largest dividend.

Q. What was the effect of this sale?

A. The purchaser (*bonorum emptor*) succeeded *per universitatem* to the debtor, i. e., he became entitled to all his rights, and liable for such a percentage of the debts as was fixed by the conditions of sale. He did not acquire *quiritarian* ownership of the goods sold, but had them *in bonis*. He sued and was sued by an *actio utilis* (not *civilis*), like a *possessor bonorum*, for both *possessor* and *emptor* were *successores* by the *prætor's* edict.

Q. Was the *bonorum emptio* used in the later period of the law?

A. No: by the *missio*, parties were still put into possession, but the goods were not sold in the mass as an *universitas*; nor did the purchaser succeed *per universitatem* to the debtor. The things were sold separately by a *curator bonorum* appointed by the magistrate with the creditors' sanction, and the price received was divided among them (1). When the value of the goods exceeded the debt, the creditor was not put into possession of the whole (*universitas*), but only of as many as would cover his claim (D. 27, 10).

Q. When did the *Sc. Claudianum* (A. D. 52) apply?

A. An *universitas* was transferred by virtue of this *Sc.* (Tac. Ann. B. 12, c. 53), when a freeborn woman insisted on cohabiting with a slave, notwithstanding the remonstrances of his master; the woman became a slave, and all her property vested in the master by virtue of the *potestas dominica*. Justinian abolished this, as unworthy of his age.

(1) Justinian says, that the *sale of goods*, as a succession *per universitatem*, was part of the *judicia ordinaria*, i. e., when it was requisite to go to the *prætor* in order to get an *actio* and a *judez*, and that *such sale* ceased when all *judicia* became *extraordinaria*, i. e., when the cause was not sent by the *prætor* to the *judez*. The *missio* was the effect of the *prætor's imperium* (B. 4, t. 6).

TITLE XIII.—OF OBLIGATIONS.

Q. What is an *obligatio*?

Pr. A. An *obligatio* (1) is a legal tie binding a man personally (2), by such means as the civil law (3) affords, to the necessity of furnishing some Thing (4).

(1) An obligation, considered with reference to the *passive* subject, *viz.*, the person bound (*debitor*), is called *obligatio* (*ligo*, I bind), and in the old law *nexum*: with reference to the *active* subject, *viz.*, the person claiming a benefit under it, it is called *nomen* or *creditum*.

(2) The *obligatio* creates a tie or relation between two individuals (*vinculum speciale*); it gives rise to a *personal*, as distinct from a *real* right; and the importance of this distinction is obvious, if we consider that the difference in the *right* creates a difference in the *action* enforcing it.—The existence of every right implies a duty on the part of every individual to abstain from any act which can interfere with its exercise; and in this respect personal rights or obligations (*proper*) do not differ from real rights, for a third party is no more entitled to interfere with me in the exercise of my rights against my debtor, than to hinder me in the enjoyment of my property. But the difference between real and personal rights lies here: the former bring us into contact with their subject-matter, but do not bind any person to us—do not subject any other person to more than the general duty of non-interference,—whereas the latter consist essentially in the relation between the creditor and debtor personally. It is this personal tie of dependence which constitutes the *obligatio* proper. Hence the commentators say a personal obligation is *jus ad rem* (a right to a thing), for the claimant is not directly connected with the subject-matter of the obligation: a real obligation is *jus in re* (a right in a thing), because the claimant is so connected. These expressions, however, are not so used in the texts. Again, real rights are sometimes called *absolute*, because they have an actual existence for everybody, and everybody is equally bound to recognise them, whilst personal rights are called *relative*, because of the personal ties which they create. Property and its integral parts—servitus, hypotheca, superficies, emphyteusis—are real rights; to which we may add those constituting the status of persons.

(3) *Secundum nostræ civitatis jura*. This includes the *jus honorarium*. Civil law is here contrasted with the natural law (the law of nations), and the implication is that circumstances involving only a moral duty or natural obligation do not create an obligation proper, unless the law of the state makes it obligatory, by attaching to it an action.

(4) Furnishing a certain thing, *alicujus rei solvenda*, here denotes generally, discharging the obligation by which a man is bound,

Q. What are the chief means by which the civil law compels the fulfilment of an obligation?

A. An action, granted to him who desires to compel, against him who refuses to fulfil the same. It is this action, attached to particular *facta*, e. g., to an agreement, which constitutes the essential distinction between a *civil* and a *natural* obligation; for the latter resting only on natural equity and the law of nations, is not enforceable by an action (1).

Q. What is the leading division of obligations proper?

§ 1. A. They are either *civil* or *prætorian*, according to the source of the action by which they are to be enforced. The *civil* are those created and sanctioned by a *lex*, or otherwise recognised by the civil law (2). The *prætorian* obligations, or *honoraria*, are those created and sanctioned by the prætor's edict.

Q. Whence do obligations arise?

§ 2. A. 1. From contracts; 2. from (*delicta*) wrongs; 3. from other circumstances (*facta*), which, though neither contracts nor wrongs, produce, by special provision of law, effects like those produced by contracts or wrongs (3).

whether such obligation be to give (*ad dandum*), or to do (*ad faciendum*), or to procure the enjoyment of something (*ad præstandum*).—*Præstare* applies generally to everything which can be the subject-matter of an *obligatio*, but more specifically it means a benefit to be procured, a thing to be procured without transference of property, as in the case of hiring and letting, or sale (B. 3, t. 23).

(1) A natural obligation, however, was not without some effect by the civil law: thus, it gave rise to an exception, so that sums paid in pursuance thereof could not be recovered; but it gave rise to no action, and this distinguished it from a *civil* obligation. The action being the essence of the obligation, they are naturally discussed together; hence in the Digest we have (B. 44, t. 7), *de obligationibus et actionibus*.

(2) *Legibus aut certe jure civili*. That is *senatus-consulta*, imperial constitutions, and customs, which included the opinions of the *prudentes*.

(3) *Obligations aut ex contractu nascuntur aut ex maleficio aut proprio quodam jure ex variis causarum figuris*.—Obligations are commonly said to arise from contracts, wrongs, *quasi-contracts*, and *quasi-wrongs*. Observe, however, Justinian does not say *ex quasi contractu*, *ex quasi delicto*, but *quasi ex contractu*, *quasi ex delicto* (*subaud. nascerentur*); that is, they exist as if

Q. What is a contract?

A. It is an agreement (*conventio*) which the civil law makes obligatory, by attaching to it an action.

Q. What is a *conventio, pactio*?

A. It is the agreement of the wills of two or more persons as to the same thing.

Q. Were agreements generally obligatory of themselves?

A. No: in Roman law an agreement did not in general create a civil obligation which could be legally enforced (1).

there had been a contract or a wrong, though in truth there has been neither. The results of the *facta* resemble those of a contract or wrong, but the *facta* themselves remain *facta* still (t. 27, *post*).

(1) The history of Roman law in the matter of obligations is curious. The earliest form of a civil obligation was by *mancipatio*, i. e., solemn sale *per æs et libram*. By this form property was transferred and agreements were made binding. But the words used on each particular occasion determined the object of the parties, and defined the condition on which the piece of brass (*æs*) was given,—in short, constituted the law of the *mancipatio* (*legem mancipii dicere*). The Twelve Tables said *quum necsom faxit mancipiumque uti lingua nuncupavit, ita jus esto*. "Generally," as Gallus Aelius says, "*necsum* is everything transacted by the piece of brass and the balance;" but particularly it applied to the obligation contracted *per æs et libram* (*). But, as in testaments (p. 120), the outward

(*) The following is a short account of the distinction between *necsum* and *addictio* (p. 9) according to Savigny.—*Grote's Greece*, vol. iii. p. 211:—

The primitive Roman law distinguished between a debt arising from money lent (*pecunia certa credita*), and a debt arising from a contract, wrong, or any other source. As to money lent, the creditor had an easy remedy against the person and the property of the debtor. For the debt was proved before a magistrate; if within thirty days thereafter it was not paid, the debtor, by *manus injectio*, (p. 9) was taken before the magistrate again, and if he neither paid nor provided a surety (*vindeas*), the creditor took him home and confined him in chains for two months: if within the two months the debt was not paid, the sentence of *addictio* was pronounced, whereby the debtor might either be put to death or sold as a slave, and his property seized.

Now this process, which continued to be the law for more than a century after the Twelve Tables, applied only to *debts arising from loans*—and then only to the *principal*, not to the *interest*—

In most cases, besides the mutual consent, something had to be transferred, certain words to be uttered, or written documents used, before an agreement became obligatory and a contract arose (1). Without these incidents, an

form was disused, and the *mancipatio*, i. e., certain solemn words, spoken or written, alone remained, so it was with obligations. Hence the *stipulatio*, a contract created by a formal question and answer (*spondes? spondeo*), and the *expensilatio*, a contract created by a formal entry in the private books of the parties (t. 15, 21),—both forms of contract derived from the *nexum*, and both reserved at first for citizens, but afterwards so modified as to be used even by *peregrini*.—Again, in some very simple contracts, e. g., a mere loan or deposit, the obligation was created by mere delivery: *res perfcitur* (t. 14). Lastly, four contracts, all very common, were transferred from the *jus gentium* and became part of the civil law, viz., sale, hiring and letting, partnership, *mandatum*; these arose and acquired binding force by the bare consent of parties (t. 22).—Notwithstanding these changes, the *nexum* long survived in theory, and Gaius (3, § 173) mentions it as existing in his time, *si quid eo nomine debeatur quod per aes et libram gestum sit*, observing that the effect of *mancipatio* might be dissolved by the same solemnity which created it (*solutio per aes et libram*).—We may add, that besides the obligation *per aes et libram*, there was another solemn mode of contracting, viz., by oath, as Cicero observes in his Offices, *Nullum vinculum ad adstringendam fidem jurejurando majores arctius esse voluerunt, ut indicant leges in XII. Tabulis*, this obligation was applied to the engagements of a freedman to his patron (p. 16).

(1) Without the consent of the parties, i. e., without an agreement, there can be no contract; but, *vice versa* there may be an agreement without a contract: obligations and contracts are not properly synonymous. Contracts are causes, sources of obligations; but not the only ones, for these may arise from *delicta* (wrongs) and from various circumstances to which special enact-

the *interest* being claimed by a gentler process, which gave no remedy against the *person* of the debtor.

The creditor, therefore, in order to bring his claim for *interest* within the stringent process applicable to the *principal*, gave such claim the *form* of an action for money lent: and the *nexum* or *nexi obligatio* was a fictitious loan, by which this object was attained. In this way the process of *addictio* was made to apply not merely to claims for the *principal* of money lent but for the *interest*, or to any other claims, to enforce which the creditors had only a remedy against the property, and not the person of the debtor. Thus it was that the debtor became *nexus*, and so subject to *addictio*.

agreement by which one promised to give or to do something continued a bare agreement (*nuda pactio*) without any action attaching. Nevertheless, there were certain agreements obligatory of themselves (1).

Q. How were contracts divided, as to their mode of creation?

A. Into four: for they arose by the delivery of some Thing (*re*); by solemn words (*verbis*); by writing (*litteris*); or by mere consent (*consensu*); hence contracts were real, verbal, written, and consensual.

Q. Were not contracts also divided into *named* and *unnamed*?

A. There were some contracts defined by the civil law, to which a special name (*proprium nomen*) and a special action were attached. Thus, we find *sale*, *mandatum*, *locatio*, *commodatum*, each raising a special action, *venditi*, *empti*, *mandati*, *locati*, *commodati*, &c. These are *named* contracts. Others had no particular name, and raised no special action, but were enforced by a general action, called *præscriptis verbis*. These are the *unnamed* contracts.

Q. Explain the origin of unnamed contracts, and the name *præscriptis verbis*?

A. As the science of law advanced, the *named* contracts were analysed and accurately defined, and to each a special formula of action was attached (2), in which the contract creating the action was specified by *name*. Hence the *iudex*, whose powers were defined by the formula, had to see whether the legal incidents of the contract *named* existed, nor could he pronounce judgment unless the facts proved in the case involved such incidents (3). Now there

ments have attached consequences, similar in some cases to those of a contract, in others to those of a wrong.

(1) Some agreements, not binding of themselves by the old law, became so either by legislative provisions, or by the prætor's edict. Thus, the *pactum donationis* was valid under the Christian emperors by mere consent of parties (p. 104). Such agreements (after they became contracts *consensual*) were called *pactiones legitime*, or *prætorian pacts*, to distinguish them both from the contracts of the old law and from the ordinary *nuda pacts*, which raised no action and had no binding force.

(2) There were ten contracts with names, *mutuum*, *commodatum*, *depositum*, *pignus*, *stipulatio*, contracts made *litteris*, *sale*, *locatio*, *partnership*, and *mandatum*. Afterwards *emphyteusis* was added.

(3) For instance, when the question concerned an alleged sale by the demandant, the part of the formula which set forth the fact on which the suit was raised (*demonstratio*) was thus: *Quod Aulus*

were very many agreements, which, although somewhat analogous to some of the *named* contracts, still did not include every necessary constituent of any one of them, and therefore could not be enforced by any action appropriate to them. Thus, an agreement by which two neighbours agree to lend each other their bullocks to plough is something like a letting and hiring (*locatio*), but still it is not one, because the price of a *locatio* must always be a sum of money, which is not the case here. Were such agreements, therefore, never binding? Was there no *action* attached to them? Certainly there was. True, they were never of themselves binding (t. 15); but sometimes the fact that one of the parties had executed his part of the agreement, was held to be a legal ground of obligation, so as to bind the other party (*subsistit causa*), and a general formula was invented embracing all such cases. Hence, as no specific name had been attached to the contract alleged by the demandant, the circumstances constituting the *unnamed* contract were explained at the head of the formula (*præscriptis verbis*). Such was the origin of the *unnamed* contracts; and such the reason for denominating the action to enforce them, *actio in factum præscriptis verbis* (1).

Q. When did performance by one of the parties constitute a legal ground of obligation?

A. Although it is difficult to lay down any definite rule, it is clear that such legal ground existed, and that the *actio præscriptis verbis* was raised whenever one of the

Agerius Numerio Negidio hominem VINDIDIT. Then: *Qua de re agitur, quicquid ob eam rem N. Negidium, A. Agerio dare, facere, oportet . . . id Iudex N. Negidium A. Agerio condemnato, si non paret absolvo.* Hence the *iudex* could not condemn the defendant (*N. Negidium*), unless the incidents of a *sale* were shown to exist by the facts proved in the course of the investigation before him.

(1) This action was first used by the jurists. Hence it is an *actio civilis*, as distinct from an action of the prætorian law. This action (in which the *factum* occurs only in the *demonstratio* of the formula) must not be confounded with another action, called *in factum*, to distinguish it from the action *in jus*, wherein the fact on which the defendant's condemnation depends occurs in the *intentio* of the formula. The action *in factum præscriptis verbis* is not *in factum* but *in jus concepta*, because the question for the judge is not whether a particular fact is proved, but whether the facts stated and proved amount to the legal idea of the contract or obligation alleged.

parties had, in consequence of an agreement, transferred the property of a thing, either that the other party might transfer the property in another thing (*do ut des*) (1), or that such other party might do something (*do ut facias*), e. g., construct or repair a building, or paint a picture. Again, when one of the parties had done something in order to get property transferred (*facio ut des*), or in order that the other party might do something (*facio ut facias*), the question whether such an agreement, followed by part performance, produced the *actio præscriptis verbis*, seems to depend on whether any analogy can be traced between such agreement and the contracts of *depositum*, *commodatum*, *sale*, *locatio*, *mandatum*, and *partnership* (2).

Q. Was a person who had transferred certain property (*datio*), in order to his receiving a *donatio* in return, or in order to his having that performed which the transferee refused to perform, entitled to any other than the *actio præscriptis verbis*?

A. Yes: in place of having recourse to that action, which was for indemnity (3), he might claim back his property by the *condictio causæ data*, *causæ non secuta*, which was open whenever a person had aliened a thing, intending another party to do something which he did not do (4).

Q. Were there not other divisions of contracts?

A. Yes: Thus, contracts were divided into *synallagmatic* or bilateral, giving rise to reciprocal obligations, and ac-

(1) This is the case of exchange—an *unnamed* contract, which was not obligatory and raised no action, except when one party to the exchange had delivered the Thing. The agreement, however, appears to have had a name, though the word *permutatio* denoted rather the fact of exchange when completed than the agreement to do so. An exchange, therefore, raised no special action but only an *actio præscriptis verbis*, which was common to all *unnamed* contracts.

(2) But when one party, after having done something, had failed to receive the consideration agreed upon, and was not entitled to the *civil* action *præscriptis verbis*, he might still have a *prætorian* action, viz., *de dolo malo*, in order to repair any damage caused by fraud, i. e., with intention to injure him.

(3) By the *actio præscriptis verbis* the defendant who had not fulfilled his obligation was compelled to indemnify the demandant by paying a sum equal to the damage incurred, as the amount was not fixed by the formula, but left to the discretion of the *iudex* (*quicquid dare facere oportet id condemnato*); it was an *actio incerti*, and in the texts it is often so designated.

(4) The *condictio causæ data*, &c., is a *condictio* proper (p. 68).

tions for the benefit of each of the contracting parties (1), and *unilateral*, in which an obligation was contracted by one only of the parties (2). There was another division, into those of *good faith*, in which the extent of each party's obligation was determined by equity and good faith (*ex æquo et bono*); and contracts of *strict law* (*stricti juris*), in which the extent of a party's obligation was invariably determined by the terms of the agreement (3). Unilateral contracts are contracts of strict law.

TITLE XIV.—HOW OBLIGATIONS ARE CONTRACTED RE (4).

Q. Which are the contracts *real*, i. e., created *re*?

A. All the unnamed contracts are real: for in all of them, unless one of the parties has given or done something in part performance of the agreement or *pactum*, it is *nudum pactum*, and raises no action. Of the named contracts four are *real*: 1. *Mutuum*, loan for consumption; 2. *Commodatum*, loan for use; 3. *Depositum*; 4. *Pignus*, or pledge. The agreement to lend, to deposit, or to pledge is *nudum pactum*; until delivery it is not a contract, and raises no action.

Q. Define *mutuum*.

Pr. A. It is the contract by which one contractor gives to the other a certain quantity of things, estimated in weight, number, or measure, such other party being bound to re-

(1) As *sale*, *locatio*, *partnership*.—*Depositum*, *commodatum*, *pledge*, and *mandatum* are sometimes called *imperfect synallagmatic* contracts, because they do not of necessity raise mutual obligations, and because it was only by something subsequent to the agreement that they raised a contrary action in favour of the deposittee, the *commodatarius* (to whom the loan was made), the pledgee and *mandatarius*, whereas they always raised a *direct* action in favour of the depositor, the lender of the *res commodata* *mandator* and the pledger.

(2) The only contracts really unilateral are *mutuum*, *stipulatio*, and the contract *litteris*.

(3) So actions of good faith give the *judex* (then called *arbiter*) power to fix the value, which was not permitted in actions *stricti juris*.

(4) *By the thing*, or perhaps by a *factum*, viz., the delivery of the thing; this seems to be the meaning of *re*, as contrasted with *verbis* and *litteris*.

turn an equal quantity of the same species and quality (*aliæ ejusdem naturæ et qualitatis*) (1).

Q. What name is given to Things valued according to weight, number, or measure?

A. *Res fungibiles*, because, according to the intention of the parties, they are substituted for and represent each other (*in suo genere functionem recipiunt: quatenus mutua vice funguntur*) (2). *Res fungibiles* are sometimes defined, Things consumed in the using them (*quæ ipso usu consumuntur*); but this is inaccurate, first, because the things usually consumed by use, as money, are not *res fungibiles* if borrowed *ad pompam et ostentationem*; e. g., when pieces of money are borrowed to mark points in a game, and are to be restored in the same identical shape, or when a money-changer borrows certain coins, not to exchange, but to ornament his collection (3): secondly, because many things not consumed by using may be *fungibiles*: thus, a copy of a work may be sent by one bookseller to another, in consideration that the latter shall send back, not the identical copy, but another of the same sort. It is, therefore, the intention of the contracting parties that makes a Thing *res fungibilis*.

Q. Whence the name *mutuum*?

Pr. A. From *ex meo tuum*: for this contract assumes that there has been a transference of property from the lender to the borrower.

Q. If the property in a thing delivered, in order to constitute a *mutuum*, was by some means prevented from vesting in the borrower, was that enough to extinguish the contract?

§ 1. A. Yes: there was then no *mutuum*; e. g., when a

(1) In case of *mutuum*, the borrower is bound to return only the quantity received. If the borrower bound himself to give back more, e. g., interest, it was necessary to superadd a *nova obligatio* by way of *stipulatio*.

(2) I. e., *genera* (classes of things), which can represent each other, are distinguished from *species* (specific things), which cannot represent each other.

(3) In these cases there is no *mutuum*, but a *commodatum*. It is often said that brute animals and other things, which though of the same species are yet individually different, cannot be the subject-matter of a *mutuum*: nevertheless if a horse-dealer give two horses, on condition of receiving two others of the same quality, this is clearly a *mutuum*, and the horses are *res fungibiles*.

pupillus lent a sum of money without his tutor's authority, the property in the money was not transferred to the borrower, because the pupillus was incapable (*non contrahit obligationem*, B. 2, t. 8, § 2). The pupillus, therefore, instead of a personal action raised by the *mutuum*, was driven to his *vindicatio* against the person to whom he gave his money, so long at least as it continued in existence, that is, had not been consumed by the borrower (p. 110) (1).

Q. What action was raised by a *mutuum*?

A. The *condictio* proper.—Generally *condictio* denotes any action where the claim is, that the defendant is bound by the civil law, either to give or to do something (*dare facere oportere*); but particularly *condictio* (proper), as defined by the formula *si paret dare oportere*, denotes an action in which the demandant insists that the defendant is bound to transfer the property to him (*dare*)—an action in which the defendant must be condemned, if it appears that he is liable to make the transfer which the demandant claims. In the *condictio* proper, the sum or thing forming the subject-matter of the demandant's claim is pointed out and defined (2). Hence the name *condictio certi* (3); and this was the action raised by the *mutuum* (4).

Q. Define *commodatum*.

§ 2. A. It is a contract in which one party lends another a thing, to be used by him gratis, the borrower undertaking to restore it after it has served his purpose.

Q. Distinguish the *commodatum* from the *mutuum*.

§ 2. A. In case of *mutuum*, the property in the thing was transferred to the borrower; in case of *commodatum*,

(1) So he who by mistake received money not due to him, was bound (§ 1) to pay it back, and might be compelled so to do by *condictio*, just as if there had been a *mutuum*, though his liability did not arise out of any contract; for he who gives with the intention of paying (*solvendi animo*), means rather to extinguish than to create a liability.

(2) E. g., *Si paret . . . sestertium decem millia, or fundum Tusculanum, or hominem Stichum . . . dare oportere*.

(3) When the subject-matter of the obligatio is not defined, it is called *condictio*, or *actio incerti*.

(4) As the terms *condictio* and *condictio certi* apply to every action by which the liability to transfer a thing definite is enforced, we use the term *condictio certi ex mutuo*, or *actio mutui*, in case of a *mutuum*.

the delivery of the thing to the borrower vested neither the whole property, nor even such part thereof as the right of use sometimes implied: the borrower had a mere licence, an authority to use it (1). Hence, whilst in case of *mutuum*, the borrower might give back one thing for another, in case of *commodatum*, he was bound to give back the very same thing he had received.

Q. What if the thing delivered was lost by accident?

§ 2. A. In case of *mutuum*, accidents, such as shipwreck, fire, robbers, though they strip the borrower of his property, did not free him from his liability, not merely because he was proprietor of the thing lost (2), but because the thing lost was not the thing which he was liable to restore; but in case of a *commodatum*, such accidents discharged the borrower, because he was liable to restore the thing borrowed, and its loss rendered his *obligatio* or liability impossible, there being no subject-matter to which it could attach.

Q. Is the *commodatarius* liable for any accidents?

§ 2. A. Yes: when occasioned by any negligence of his; for the *commodatarius* who has the use of the thing gratis, is liable for every sort of negligence: nor is it enough for him to apply the same diligence in respect to the thing lost, as is usual with him in respect to property of his own, provided that another person by the exercise of greater care (*diligentior alius*) would have been able to preserve it (3). Thus, a *commodatarius* is responsible if things lent to him have been stolen, but not if forcibly carried away, and he is responsible for things forcibly carried away, if he has exposed them to such danger by taking them on a journey.

Q. Was the *commodatum* always gratuitous?

A. Essentially (4) so; for when the borrower promised to pay a consideration, it was a *locatio*.

(1) The *commodatarius* had no *absolute* right of use *in re*, but a mere *relative* right of use, claimed under an *obligatio*, which bound the lender to allow him such use (p. 232, n. 2).

(2) The rule is *res perit domino*; now in case of a *commodatum* the borrower, *i. e.*, the holder, is discharged; but in case of sale, if a thing sold has not been delivered, but has perished by accident, the seller is discharged from any liability to transfer the property, though he is certainly entitled to the price (t. 23).

(3) The responsibility of the *commodatarius* is less extensive, when the loan is an advantage to the lender also.

(4) In contracts a distinction is made between what is *essential*, what is *natural*, and what is *accidental*. That is *essential* to a

Q. What *actions* are raised by a *commodatum*?

A. Two: the *actio directa* and the *actio contraria commodati*.

Q. Who might be plaintiff and who defendant in the *actio directa commodati*?

A. The lender of the Thing might sue the borrower, to compel him either to restore the thing after he had made such use of it as the terms of the loan allowed (for the lender could not claim it before), or to pay the damage occasioned by his neglect.

Q. Who might be plaintiff and who defendant in the *actio contraria commodati*?

A. The borrower of the Thing might sue the lender for the indemnity due to him; for the contract, though it did not directly raise a liability on the lender's part, might do so; *e. g.*, the lender would be liable to indemnify the borrower for any extraordinary expenses required to preserve the thing, or for any damage occasioned in using it, by reason of defects which the lender did know of, but the borrower did not. The action thus allowed to the borrower was called *contraria*, to distinguish it from the lender's action, which was called *directa*, because it flowed directly from the contract, inasmuch as the thing received must of necessity be restored to the lender; whereas the *actio contraria*, though a result of the contract, arose out of circumstances subsequent to it, and which might or might not come to pass.

Q. Define a *depositum*.

§ 3. A. It is a contract in which one man (*depositarius*) receives the Thing belonging to another, which he is to keep gratis, and to restore at the will of the depositor.

Q. When a thing was deposited for a certain period, could it be demanded back before the lapse of such period?

A. Yes: in this respect a *depositum* differed from a *commodatum*, and the reason is, that since the depositary had no object in prolonging his services, which were purely gratuitous, the period was considered to have been fixed for the sole benefit of the depositor, in order to prevent the depositary from restoring the thing at an inconvenient mo-

contract, without which it cannot exist. That is *natural* to a contract, which is generally implied in it, but which may be subtracted from it without destroying it. That is *accidental* to a contract which is not naturally included in it, and does not form part of it, except by special agreement; *e. g.*, when a consideration is stipulated for in a *mutuum*.

ment: but the deposit^{ee} was not entitled to offer to restore it before the expiration of the fixed period, unless he had strong reasons for so doing.

Q. Was the deposit^{ee} responsible for negligence; *e. g.*, if the deposit was stolen?

A. No (1): he was not liable unless he had acted fraudulently and with gross negligence, which was deemed fraud; unless, indeed, he had offered to take the deposit, in which case he was responsible for slight negligence; for in general the fact of offering to incur an obligation increases its stringency.

Q. What actions were raised by a *depositum*?

A. Two: the *actio directa depositi*, which was allowed to the depositor, in order to enforce the restitution of the thing deposited (2), and the payment of damages arising from the fraud or the gross negligence of the deposit^{ee}: the *actio contraria depositi*, which was allowed to the deposit^{ee}, in order to compel the depositor to reimburse him the sums expended (3) by the deposit^{ee} on the deposit, and to indemnify him against any damage which the deposit might have caused (4).

Q. What is a *pignus*?

§ 4. A. A contract by which something (5) is delivered to a creditor to secure his debt, to be returned *in specie* after the debt has been paid.

Q. What actions were raised by a *pignus*?

A. The debtor had the *actio directa pignoratitia* against the creditor, to compel him to restore the Thing itself, after the debt was discharged for which the pledge was given (6),

(1) He who employs a negligent deposit^{ee} has himself to blame for the selection (§ 3).

(2) The *depositum necessarium*, or the deposit from necessity, was a deposit which a man was compelled to make in consequence of some accident, such as a fire, &c. A *sequestratio* was when two parties deposited something with a *sequester*, to abide a certain event; *e. g.*, the event of a suit, the deposit to be restored to the successful party.

(3) Even ordinary ones, as for nourishment of the depositum.

(4) The depositor was liable for every kind of neglect.

(5) Moveable or immoveable (p. 110). A *hypotheca* was a mere charge, and there was no deposit. The word *pignus* (pledge) denotes, 1st, the contract of pledge; 2nd, the right *in re* acquired by the creditor by means of the contract, when the debtor was capable of disposing of the thing pledged; 3rd, the thing pledged.

(6) But the emperor Gordian decreed that the creditor might

or to compel the creditor to pay the surplus in his hands in case the thing had been sold and the debt paid (p. 112); and in all cases the creditor had to pay damages even for slight neglect (1). Secondly, the *actio contraria pignoratitia*, allowed to the creditor, to reimburse himself for expenses (2) incurred in preserving the thing pledged, and for any damage occasioned to him through the pledge, by the debtor's negligence; or, lastly, by the creditor being dispossessed by the true owner, where the debtor had pledged something not his own.

Q. Could a person who gave the property of another as a *commodatum*, a deposit, or a *pignus*, bring the direct actions peculiar to these several contracts, in order to recover the Thing so lent, deposited, or pledged?

A. Yes: for the contract, though the subject-matter thereof was property belonging to another, was still a valid contract between the parties, and raised mutual obligations, particularly that of restoring the thing to him from whom it came; unless, indeed, the person who received it was himself proprietor: for no man can hold his own property as a *commodatum*, a deposit, or a pledge.

Q. From what you have said, it seems that delivery might, according to the intention of the parties, transfer or not transfer the property, and so create a *mutuum*, a *commodatum*, a deposit, or a pledge: was it the same with *mancipatio* and *cessio in jure*?

A. No: they always transferred the property; but there might be an agreement called *fiducia*, by which the new proprietor would be obliged to re-mancipate and to re-assign (*recedere*) the thing. Thus the pater-familias, in order to dissolve his authority, generally *mancipated contracta fiducia* (p. 37). So, also, in *depositing* a thing with a friend, or pledging it with a creditor, the ownership was transferred to them, to be afterwards revested, accord-

retain the pledge after payment of the debt to secure which it was given, in order to cover other debts due by the same debtor.

(1) The responsibility of a creditor holding a pledge is the same as that of a *commodatarius*; but it is greater than that of a depositor, because the depositor is the only party benefited, whereas the pledge both gives the debtor increased means of credit, and secures the creditor in the payment of his debt.

(2) Even ordinary ones, because the creditor, holding a pledge like the depositor, and unlike the *commodatarius*, could not make use of such pledge. Where he agreed to take the fruits of the pledge in the place of interest the *pignus* became *antichresis*.

ing to the agreements which accompanied the *mancipatio* and *cessio in jure*. These agreements created a contract of *fiducia*, which raised the *actio directa* and the *actio contraria fiduciae* (1).

TITLE IV.—OF OBLIGATIONS CREATED BY WORD OF MOUTH.

Q. Define obligations created *verbis*.

A. They are those arising from a *stipulatio* (2).

Q. Define *stipulatio*.

Pr. A. It consists of a question, by which one of the contracting parties asks the other whether he will promise to give or to do something, and of the answer by the other party that he does so promise. The *stipulatio* is not strictly a contract, but a mode of contracting, a form for giving agreements a solemnity which they would not otherwise possess. And this appears from the etymology of the word; for *stipulum* denotes something firm, solid, from *stipes*, a stem.

Q. What actions were raised by a *stipulatio*?

Pr. A. Two: each of them allowed to the stipulator (promisee) (3), but varying with the nature of the *stipulatio*—

(1) *Mancipatio* and *cessio in jure, fiducia causa*, did not apply to provincial lands (pp. 76, 78). Hence the *pignoris datio* was introduced, which transferred the possession without the property, and might take place between *peregrini*. Though Gaius (2, § 60) and Paul speak of *mancipatio* and *cessio in jure, fiducia causa* as existing in their time, it had entirely disappeared in that of Justinian. Observe the history of law as to pledging: 1. *Mancipatio fiducia causa*, transferring the property to the creditor; 2. *Pignoris datio*, transferring the possession, but not the property; 3. *Hypotheca* (an invention of the prætors), giving a mere right of action, and leaving both the property and the possession in the debtor.

(2) Besides this, there were two other verbal obligations; for, 1. A freedman bound himself by oath to do certain services for his patron (pp. 16, 235). And, 2. A wife and her paternal ancestors bound themselves by *dictio dotis* to give the *dos* to the husband. But under Theodosius, the mere agreement to give the *dos* was binding, and *dictio dotis* ceased; obligations by oath being confined to a particular case, *stipulatio* is the only verbal obligation discussed by Justinian.

(3) *Stipulari* is properly to have a promise made to one by the person questioned; but in a wider sense, *stipulantes* denotes both contracting parties, that is, he who puts the question and he who answers it (*utroque stipulantium*, § 1).

viz., 1st. The *condictio* proper, or *condictio certi* (t. 13), when the stipulatio is certain; 2nd. The action *ex stipulatu*, or *condictio incerti*, when the stipulatio is uncertain (1).

Q. When was the stipulatio certain?

A. When a man by it became liable to give (p. 241) a thing certain; if not a specific article, at all events one whereof the species, quality, and quantity were ascertained (*quid, quale, quantumque sit*); e. g., the slave Stichus, ten pieces of gold, 100 amphoræ of wine, of the best quality, and of a particular district.

Q. When was the stipulatio uncertain?

A. Whenever its subject-matter was something which a man had promised to do, or which he had promised not to do; or when the thing due was indeterminate in its quantity or quality (2).

Q. Why was the stipulatio for something to be done always uncertain?

§ 7. A. Because it was impossible to compel one, who had promised to do a thing, to do it specifically, e. g., to build a house, or to paint a picture; and because the action raised by such an *obligatio* could result only in a pecuniary condemnatio, the amount of which (being left indefinite in the *formula*) had to be regulated by the *iudex*, according to the interest which the demandant had in the execution of the promise by the defendant. This interest was indefinite, and varied with circumstances; but it lay on the demandant to prove it. Hence, in order to be relieved from the necessity of making such proof, and to prevent a stipulatio continuing uncertain (*ne quantitas incerta sit*, § 7), the creditor often took the precaution of fixing, by a supplemental stipulatio, the sum which the debtor should pay, in case the obligation to do the particular thing was not performed (3). For, then, when the debtor

(1) The *actio ex stipulatu*, which, as opposed to *condictio certi*, denotes an action raised by a stipulatio, the subject-matter of which is *incertum*, was sometimes used as a general term for any action raised by a stipulatio.

(2) E. g., the stipulatio *rem pupilli salvam fore* (p. 53), or *domum edificari* are uncertain; so also when a slave was stipulated for, but no particular one was mentioned; or when a quantity of wine was stipulated for, but no quality was mentioned. The stipulatio for a usufruct or other servitude was considered uncertain. All such stipulations raised the *condictio incerti*.

(3) Thus, *si ita factum non erit tunc pœna nomine decem aureos dare spondes*? This was called the penal clause.

failed to perform his promise, the creditor claimed not by the *condictio incerti id quod interest*, but by the *condictio proper*, the sum fixed by the supplemental stipulatio.

Q. Did a stipulatio, in order to its validity, require particular words?

§ 1. A. Before the reign of Leo, certain special words were required, e.g., *Spondes? Spondeo: Promittis? Promitto: Dabis? Dabo: Facies? Faciam: Fidejubes? Fidejubeo: Fidepromittis? Fidepromitto*. A stipulatio not in the regular words, e.g., *Polliceris? Polliceor*, would not have created any obligation. Moreover, the special words might be translated into Greek, or any other language (1), provided the parties understood each other; for the question and answer might be in different languages. According to Leo's Constitution (A. D. 469), there could be no valid stipulatio, unless the parties gave their consent by some words or other; and there could be no verbal obligation without a stipulatio, i. e., a direct question and answer.

Q. How might a stipulatio be made?

§ 2. A. It might be unconditional or conditional, or for a particular period (*in diem*).

Q. What was its effect if unconditional?

§ 2. A. The result was, that the obligation might be required to be executed immediately; so far, at least, that the creditor (stipulator) who sued immediately would not be liable to the charge of *plus-petitio* (B. 4, t. 6); for a debtor was, of course, entitled to a reasonable time for the performance of his promise (t. 19, § 27).

Q. When was a stipulatio said to be for a particular period, and what was its effect?

§ 2. A. When the contracting parties fixed upon the period when the obligatio was to be executed—thus, *Decem aureos primis calendis Martiis dare spondes?* By annexing a period, the time for payment was postponed until such period had expired (2), so that the stipulator lost his action if he brought it before. Observe, however, that although the period suspended the action of the creditor,

(1) Except *spondes? spondeo*, which was peculiar to Roman citizens, and therefore part of the civil law, whereas the other forms were open to *peregrini* (Gaius 3, § 93).

(2) The stipulator (promisee) must not begin his action on the day fixed; for if the debtor paid the last minute of that day he would still be within the period, for he was entitled (§ 3) to the whole.

it did not affect the existence of the debt; in other words, though the debt was not demandable (*dies venit*) until the period had expired, still the liability arose (*dies cedit*) whenever the *stipulatio* was made (*statim quidem debetur; peti . . . non potest*); and in this respect a fixed period differed essentially from a condition.

Q. When the *stipulatio* indicated a particular day on which the obligation was to cease (1), did the arrival of such day instantly determine the obligation?

§ 3. A. No. The modes of determining obligations were fixed by the civil law (t. 29, *post*), and lapse of time was not one (*ad tempus deberi non potest*). If a man, therefore, agreed by *stipulatio* to pay every year a particular sum, until the death of his creditor, the obligation, although its term was fixed, continued after the decease of the creditor, just as if it had been an unconditional *stipulatio*, and his *hæredes* had the action raised by the *stipulatio*; but the debtor might bar it, and avoid the condemnation by the *exceptio*, or plea, *pacti conventi*, or *doli mali*.

Q. When no fixed period was expressed, but some place for payment was fixed, other than that at which the parties contracted; e. g., when a *stipulatio* was made at Rome to pay at Carthage, was such *stipulatio* absolute?

§ 5. A. No: a fixed period was implied. It was presumed that as the execution of the contract was referred to another place, the parties also referred to another time, viz., such a period of time as the distance required; otherwise, the obligation, being impossible, would be null. Hence, a promise made at Rome to pay the same day at Carthage is declared by the text to be void.

Q. When was a *stipulatio* conditional? and what was its effect?

§ 4. A. It was conditional when the promise was made subject to an uncertain event, as, *Do you promise to give such a sum, if Titus is appointed consul?* Such *stipulatio* raised no obligation, unless the case provided for happened, and when it did, then, as the text says, *committitur stipulatio*. Till then there was no debt: the stipulator had a bare expectation (*spes est debitum iri*), transmissible (2), however,

(1) This was a *stipulatio ad diem* (*ad quem*); it was *ex die* (*a quo*) when the day upon which it was to be executed was indicated.

(2) But (B. 2, t. 14, § 10) in a will neither the *hæres institutus* nor the legatee could transmit anything to their *hæredes* if they died before the condition happened. The reason is this: in obli-

to his *heredes*, and which the promissor could not take from him (1).

Q. According to that, what is the effect of this: *Do you promise to give me so much, if I do not go up to the capitol?*

§ 4. A. It cannot possibly raise any obligation or any action until the death of the party stipulating for it (2). For then only can it be certain that the stipulator has not gone up to the capitol, and that the negative (3) condition has been fulfilled. In case of obligations, a man cannot offer the *cautio muciana*, so as to enable him to demand the execution of the contract whilst the condition is in suspense (p. 172).

Q. Is a stipulation subject to a condition proper, when made subject to an event past or present; e. g., *If Titius has been consul, or if Mævius is alive, do you promise to give?*

§ 6. A. No: for, either the fact is not true, and then the obligation which does not now exist never will: or the fact is true, and then the existence of the fact gives instant effect to the contract. It matters not whether a fact is or is not known to the parties; if the fact is really so, that is enough to prevent the obligation being suspended.

gations, the two parties contract for themselves and for their *heredes*; whereas testamentary dispositions are supposed to be made on considerations *personal* to the legatee or *heres institutus*. Nothing being due before the condition was fulfilled, it follows that if a man received anything promised under an unfulfilled condition, an action would lie against him for its recovery; but if a person stipulated for a thing after the lapse of a fixed period, the debtor would have no right to recover what he voluntarily paid before the lapse thereof, because he was then under an obligation, though it could not be immediately enforced.

(1) The promissor must do nothing to hinder the fulfilment of the condition; if he does, he will lose the benefit of such condition.

(2) (§ 4). Therefore the stipulator cannot bring the action; it must belong to his *heredes*. In this respect the clause *If I go up to the capitol* is equivalent to *when I die*. But in other respects these two clauses materially differ. For as the stipulator must die at some time, *cum moriar* is not a condition, but a fixed period; but as he may or may not go up to the capitol, the stipulation is subject to this uncertain fact, and is therefore conditional.

(3) A negative condition is not fulfilled until the fact involved has become impossible.

TITLE XVI.—OF CO-STIPULATORS (JOINT PROMISEES) AND JOINT PROMISSORS.

Q. May there not be more than two parties (*rei*) (1) to one stipulatio?

Pr. A. Yes: there may be in the same obligation several joint stipulators or joint promissors.

There were several joint stipulators, when the promisor was questioned by several persons whether he would undertake to give or to do the same thing, and he answered all at the same time, that he would. Suppose, for instance, that Titius and Mævius questioned Sempronius whether he would promise to give ten pieces of gold, and he answered, *utrique vestrum dare spondeo*. If the promissor answered successively first one question and then another, there would be as many different obligations, and not a joint stipulatio, for that expression applied exclusively to the concurrence of several stipulators in one obligation.

There were several joint promissors when several persons answered the stipulator after they had all (2) been questioned on the same subject (*eodem decem*).

Q. What was the effect of a stipulatio in which there were several joint stipulators, or several joint promissors?

§ 1. A. Its effect was to make each joint stipulator a creditor for the whole (*solidum singulis debetur*), and each joint promissor a debtor for the whole (*singuli in solidum tenentur*). But as the same thing was due only once, the payment made by one joint promissor discharged all the others, in like manner as the payment to one joint stipulator discharged the promissor in regard to all the other stipulators.

Q. May the debtor pay any one of the joint stipulators he pleases?

(1) *Reus* properly denotes the debtor to whom the question is put; but generally the name *rei* signifies the parties.

(2) If, after having questioned one and received a direct answer, the stipulator questioned another and received another answer, there would be two different stipulationes, not two joint promissors in the one stipulatio. But it was of no moment whether the question was put to the promissors, and they answered together in the plural number (*spondetis? spondemus*) or separately, in the singular (*spondes? spondeo*). Hence, it was the form of the contract, i. e., the mode in which the questions and answers followed each other, which made each of the joint promissors liable for the whole.

A. Yes: unless one of the stipulators has already brought an action on the contract; for then such stipulator is the person to be paid. So, after action brought against one of the joint debtors, it would seem that the rest ought not to be liable; but Justinian allowed the creditor to sue each joint debtor successively until the debt was paid.

Q. Of co-promissors might some be bound unconditionally, and others for a fixed period, or conditionally?

§ 2. A. Yes: the persons answering the stipulator became co-promissors from the mere fact, that the same thing was promised by all of them at once: it mattered not whether some promised unconditionally and others for a fixed period, or conditionally; nor did the fixed period, or condition attached to the obligation of the one, prevent those being sued who were unconditionally liable.

Q. In case of a *commodatum* or *depositum*, or other contract created without solemn words, might there be several creditors entitled to claim, or several debtors liable for the whole?

A. Yes: in such contracts, as in a *stipulatio*, the contracting parties might, if they so intended, impose on several a common obligation, and make each liable for the whole amount (D. 45, 2, 9).

TITLE XVII.—OF THE STIPULATION OF SLAVES.

Q. Could a slave make a *stipulatio*?

Pr. A. Yes: he might *stipulari* (1); i. e., have a promise made to him in right of his master; in fact, he had the same capacity *stipulari* as the person on whom he was dependent.

The slave who belonged to a *hæreditas* not yet accepted (*adita*) might have a promise made to him in right of the deceased, just as if he were living, because the *hæreditas* represented the person of the deceased (2).

(1) *Stipulari* to have a promise made to him, but not to bind himself or his master, unless the slave was acting by his master's command, or in the management of his own *peculium*; in these cases, however, the matter could be sued only by prætorian action (B. 4, t. 7).

(2) There were exceptions (*in plerisque*). Thus, in order to acquire an *hæreditas*, of which the slave was *hæres institutus*, he required an order (p. 114); to obtain which he had to wait until the *hæres* the new master had accepted the *hæreditas* of the slave's deceased master.

Q. To whom did the benefit of the promise made to a slave belong?

§ 1. A. Whether the promise was made to the slave expressly for his master, or for himself, or for another slave of the same master, or whether it was made to him, without specifying any one, the benefit of the obligation always belonged to the master (1).

Q. When the slave stipulated for something personal to himself; *e. g.*, that he should have a right of passage, did the master acquire the right promised to the slave?

§ 2. A. No: the licence was to the person of the stipulator himself (*ut sibi* (2) *liceat*); and the promissor, who was not bound to allow any one but the slave to pass, might refuse a passage to any other, even to the master. Nevertheless, the master obtained the benefit of the stipulatio in this way, that he might insist upon having his slave pass, and might sue *ex stipulatu* to compel the promissor to fulfil his obligation.

Q. When the slave-stipulator belonged to several masters, which of them was entitled to the benefit of the stipulatio?

§ 3. A. Each was entitled according to the share which he had in the slave, unless the stipulatio was made by direction of one only, or on behalf of one of them by name; for he alone was then entitled to the benefit of such stipulatio. So, also, we except the case where one of the masters was incapable of taking advantage of the stipulatio; as, *e. g.*, when he was already owner of that which the promissor had bound himself to give. Lastly, if the slave named his master, as by saying, *Do you promise to give Titius and Seius?* the benefit of the stipulatio was divided, not according to the amount of each master's property in the slave, but equally between them.

TITLE XVIII.—OF THE VARIOUS KINDS OF STIPULATIONS.

Q. How are stipulations divided?

Pr. A. Into *conventional*, *judicial*, *prætorian*, and *common*, *i. e.*, those both *judicial* and *prætorian*.

Q. Explain the *conventional*.

(1) So it was with *fili familias* (B. 2, t. 9).

(2) But the slave might stipulate for his master to pass, whereby a servitude would vest in the master. The case in the text is a personal licence, and does not attach to the land.

§ 3. *A.* This name applies to those voluntarily created by the parties, without the interference of a *judex* or the *prætor* (1).

Q. What are *judicial stipulations*?

A. Those which a *judex* (2) alone had power to direct to be concluded. Such are stipulations *de dolo cautio*, *de persequendo servo qui in fuga est*, *restituendove pretio*.

Q. Explain the use of the stipulatio *de dolo cautio*.

§ 1. *A.* It was directed by the *judex*, in order to provide demandant with a security (*cautio*) that the judgment given in his favour should be executed without fraud on the defendant's part. Thus the *judex*, whilst condemning Titius to give me a slave, the property in which he had unjustly refused to transfer to me, would direct him to give security by stipulatio, that he had done no fraudulent act to lessen the value of the slave; for Titius, though he gave me the slave, might give him in a deteriorated condition, *e.g.*, poisoned. The same security was required of a defendant condemned to transfer a Thing to a proprietor who had brought a real action for it (D. 6, 1, 20, 45).

Q. Explain the purpose of the *stipulatio de persequendo servo*, &c.

A. Suppose *vindicatio* brought for the property in a slave, the property in which has, during the suit, vested by *usucapio* in the holder; and suppose the slave escape before judgment, not by any complicity of the defendant, but by some act of negligence on his part, it is clear he cannot be compelled to deliver what he has not got; but being proprietor, and, as such, alone capable of following the slave, and claiming him back, the *judex* directs him to become bound by stipulatio to pursue the slave in order to recover the same (*de persequendo servo*), and to deliver him over or to pay his value (*restituendove pretio*). If the defendant has not even been guilty of negligence, he is only bound to promise that the slave shall be delivered up when he again comes under his control, and to assign his rights of action to the demandant, who will exercise them at his own risk (D. 4, 2, 14, 11).

(1) Of such stipulations there were as many as there were things to be contracted for (§ 3); the others were decreed only under certain circumstances.

(2) Before a *judex* the parties were *in judicio*, before the *prætor in jure* (p. 6).

Q. What were the *prætorian* stipulations?

§ 2. A. Those which could be concluded only by order of the *prætor*, and not of the *judex*; e. g., those *damni infecti* and *legatorum*. Under the *prætorian* we include the *ædilitian* stipulations, viz., those contracted by order of the *ædiles*; for they, like those ordained by the *prætor*, emanate from a magistrate *judicens* (a *jurisdictione*) (1).

Q. Explain the object of the stipulatio *damni infecti* (imminent danger).

A. It was used when the proprietor of something dangerously defective, e. g., an insecure house, was obliged by the *prætor* to guarantee his neighbour against the damage wherewith he was threatened (2). If the proprietor refused to undertake this liability, the *prætor* put the demandant in possession of the house.

Q. Explain the *cautio legatorum*.

§ 2. A. The stipulatio decreed by the *prætor*, on demand of the legatees, by which the *hæres* guaranteed the execution of those legacies which were not to be immediately executed; for without this guarantee the *hæres* might squander the whole estate and become insolvent, whilst the legatees were incapable of suing before the term expired or the condition was fulfilled.

Q. What are common stipulations?

§ 4. A. Those which may be decreed either by the *prætor* (*in jure*) or by the *judex* (*in judicio*): such as stipulations *rem salvam fore pupilli* and *de rato*.

Q. Explain the former.

A. That by which the tutor and the *fidejussores* (tutor's sureties) guaranteed the preservation of the pupil's fortune (*vide* p. 53). This guarantee was given before the tutor entered on his functions, and it was the *prætor's* duty to see it provided. But it sometimes happened that a tutor sued the debtor of a pupillus, and brought him, in course of the *actio*, before a *judex*, such tutor having neglected to furnish this *cautio*: now, if the

(1) It was an *ædilitian* stipulation, by which the vendor was compelled to guarantee that the article sold was free from a particular defect.

(2) Observe, injury to another by property of mine does not raise a direct claim against me, for nothing can be demanded from me if I abandon the cause of the damage (B. 4, t. 8, 9). Thus, if my house fall on my neighbour's land, he has no direct action against me. And this is why the *prætor* compels me beforehand to promise him an indemnity.

defendant took this objection, the suit could not proceed; but to remove the difficulty (*si aliter res expediri non potest*), the *judex* might direct the tutor to enter into a *stipulatio rem pupilli*, &c.

Q. Explain the *stipulatio de rato* or *ratam rem haberi*.

A. It was required from a procurator, who conducted a suit in another's name; by it the procurator was bound to obtain the ratification of him whose cause he had taken in hand. Properly, it was directed to be given by the prætor before the *litis contestatio*; but if this had been neglected, and there was reason to doubt the existence of the authority (*procuratio*) which the demandant claimed, the *judex* in the case might direct the security to be given (B. 4, t. 11).

TITLE XIX.—OF VOID STIPULATIONS.

Q. On what grounds were stipulations void?

A. 1. On account of their subject-matter (*Pr.* §§ 1, 2, 22, 24). 2. On account of the persons by whom (§§ 7, 8, 9, 10, and 12), or for whom (§§ 3, 4, 19, 20, 21), or between whom (§ 6) they were made. 3. On account of the manner in which they were created (§§ 5, 18, 23). 4. On account of the time (§§ 13, 14, 15, 16, 26, 27), or the condition (§§ 11, 25) attached to them.

Q. When was a stipulatio void by reason of its subject-matter?

§§ 1, 22. A. It was void when a man stipulated: 1, for some nonentity; *e. g.*, a centaur, or for something which had ceased to be; *e. g.*, a slave already dead (1); or 2, for something not the subject of commerce; *e. g.*, a thing *sacrum*, *religiosum*, or *publicum*, or for a free-man; or 3, for something which, though the subject of commerce, could not be acquired by the stipulator (2); *e. g.*, for something of his own, which, therefore, could not be acquired by him again; or 4, for the doing of an impossible act, or one contrary to the laws, or *contra bonos mores*; *e. g.*, a parricidal or sacrilegious act (§ 24).

Q. In these cases did the stipulatio continue void after the obstacle to its inception had ceased?

§ 2. A. Yes. Thus, even though a thing *publicum* or *sacrum* became the subject of commerce, though the free-

(1) But a man might stipulate for a thing about to be.

(2) Thus, a Christian slave could not belong to a Jewish master.

man became a slave, though the thing stipulated for ceased to belong to the stipulator, the stipulatio continued void, at least when it was unconditional.

Q. Suppose the stipulatio was conditional and made under the presumption that the thing stipulated for might become capable of being transferred to the stipulator?

§ 2. A. The stipulatio was still void as to things which by their nature were excluded from commerce; e. g., a freeman, a thing *sacrum* or *publicum*. But when the stipulatio was stopped in its inception by a personal and temporary obstacle, the stipulatio was valid, if, on the condition being fulfilled, the obstacle was removed, because it was only then that the obligation began to exist (p. 249). Thus there is nothing to prevent me stipulating for what is now part of my property, in case it shall cease to be mine.

Q. Did a stipulatio, originally valid, become null by its becoming impossible for the stipulator to acquire the thing stipulated for?

§ 2. A. Yes: for, as a general rule, an obligation is extinguished when such a state of things arrives as would have prevented the obligatio arising. If, then, the thing originally promised ceased to be *in commercio*, and perished absolutely, the debtor was discharged, provided that this state of things came to pass without any neglect or any act on his part (*sine facto ejus*), and provided he was not behindhand; i. e., after his time in delivering the thing promised.

Q. Had a stipulatio any effect if the stipulator afterwards acquired the subject-matter thereof?

A. It was not absolutely void unless the promissor had become liable from mere love and affection; and unless the stipulator had acquired the thing without valuable consideration; e. g., by becoming hæres of its owner; for in this case the stipulatio was void because *duæ causæ lucratiæ* (p. 164) cannot concur in respect to the same thing, and in favour of the same person. But if valuable consideration had passed, and the debtor could not give the thing promised, he had to pay the value of it.

Q. When was a stipulatio void on account of the contracting parties?

§ 7. A. When one of them was a lunatic, an infant, deaf or dumb, or when it was made between absent persons, or one party was subject to the other.

Q. Why was a lunatic incapable?

§ 8. A. Because there was no valid *stipulatio* without

consent, which a lunatic, except in lucid intervals, could not give.

Q. Was an impubes, above the age of infancy, always capable of contracting a verbal obligation?

§ 9. A. He might *stipulari*, i. e., have a promise made to him; and he might if *sui juris* promise on obtaining his tutor's authority (1). But a *filius-f.* under fourteen could not bind himself even with the *pater-f.*'s authority (§ 10).

Q. Why were persons deaf and dumb incapable?

§ 7. A. The latter, because they could neither put a question nor give an answer: the former, because the stipulator (questioner) and promissor were required to hear each other (p. 129). The same reason applies to persons absent (§ 12); for by absent we mean those who are so distant from each other as not to be able to hear each other (2).

Q. Why was a stipulatio void when one of the parties was subject to the other?

§ 6. A. Because unity of interest so confounded the persons as to make them one. For, suppose a stipulatio made by a slave for his master's benefit, the master being promissor, this was as if he had made a promise to himself (t. 17, ante). So it was when the *filius-f.* stipulated with the *pater-f.* (§ 4), unless the obligatio related to the peculium, of which the stipulator was owner.

Q. When was a stipulatio void by reason of the person for whom it was made?

(1) According to the text (§ 10), pupilli were: 1, *infantes*; 2, *infantia proximi*, both being under seven years; 3, *pubertati proximi*, above seven (p. 50). At first the third class alone were capable of contracting (on obtaining the tutor's authority, when necessary), because during the two former periods the impubes, as to intelligence, *non multum a furioso distant*; but afterwards the *infantia proximus* had the same capacity to contract as the *pubertati proximus* (p. 48). Hence the division into two periods (B. 1, t. 21, B. 4, t. 1).

(2) To avoid all fraud Justinian declared (§ 12), that when there was a writing (*instrumentum*) proving that a stipulatio had been made between two persons present at a particular place and time, such document should be conclusive until one of the contracting parties was proved to have passed the whole day in question elsewhere. And in order to prove this writings were necessary, because the general rule was, that parol was not admitted against written proof. The emperor, however, admitted witnesses if worthy of credit (*idoneos*).

§§ 3, 21. *A.* When the promissor answered that a third party would give or do something; for this promise obviously did not bind the third party: and as the promissor did not promise to give or do anything himself, the stipulator had no action against him (1). On the other hand, a stipulatio made for the benefit of a third party was null, unless the party making it had some interest in it (2).

Q. Was it impossible to stipulate for any third person whatever?

A. No: though a man could not stipulate for those not of his family (*extranei*, § 4), he might do so for those on whose behalf he might acquire. Thus a filius-f. or a slave might have a promise made to them for the pater-f.; the pater-f. might have a promise made to him for his slave, and so might his filii-f. as to anything, at least, which he might acquire through them.

Q. Cite cases in which a stipulatio made by another was valid because the stipulator had an interest in it.

§ 20. *A.* Suppose I have an agent to manage my business, or a creditor who, not being paid, is about to avail himself of a penal clause in his favour, or to sell what I have pledged with him, and I have a promise made to me (stipulatio) by a promissor by which he binds himself to give a certain sum to my agent or my creditor,—such stipulatio is valid because I am interested that my agent shall not want money, and that my creditor shall be paid. So again when a tutor resigned his tutela to his co-tutor, who promised along with a surety *rem pupilli salvoam fore* (p. 53), the retiring tutor might avail himself of such stipulatio, for though discharged from the active duties of tutor, he continued responsible, and was therefore interested in the security obtained for the pupillus (3).

Q. In stipulating for or on behalf of a third party, may

(1) But if one promised to make another give or do something (§ 3), or if one became bound to pay a penalty or an indemnity, in case another should fail to give or to do something, the promise was good.

(2) If the stipulatio were made for the stipulator and for a third person (*sibi et alii*, § 4), the stipulator could claim the benefit of the half only (Gaius, 3, § 113).

(3) Hence generally a tutor could not have a promise made to him (*stipulari*) for the pupil, though in some cases a pupil acquired an *actio utilis* by a contract made by the tutor. Properly the stipulator was the pupil himself, but sometimes his own, or a public slave (pp. 33, n., 53, n.), acted.

I not stipulate for a penalty to myself; i. e., a sum to be paid by the promissor if he does not perform the stipulatio to the third party?

§ 19. A. Yes. As stipulator I have a clear interest, and therefore an action, not indeed for what has been promised for the third party, but for the penalty promised to me (1). Thus, a stipulatio to this effect: *Do you promise to give your house to Titius?* is null; but add, *And if you do not give it, do you promise to give me 100 pieces of gold?* and it becomes valid.

Q. Though I cannot name a third person as the person to be benefited by a stipulatio, may I not name him as the person to receive payment; e. g., may I not stipulate for a thing to be given to me or to Titius?

§ 4. A. Yes; still the stipulator is the sole creditor; the third party named to receive the thing promised, is only a mandatory, an assistant allowed to the stipulator by the agreement, not to reap any benefit from the stipulatio, but to facilitate its execution. This assistant is sometimes called *adjectus solutionis gratia*, and payment to him, though against the stipulator's will (*etiam eo invito*), discharges the debtor; but then there is the *actio mandati* open to the stipulator against the *adjectus*, to compel him to refund what he has received.

Q. When was a *stipulatio* void on account of the mode in which it was created?

§ 5. A. When the answer did not agree with the question; as when the stipulator made his proposal absolutely, and the promissor promised conditionally (2).

Q. What if one party stipulated for ten sesterces, and the other party in his answer promised five?

§ 5. A. Justinian, following Gaius (B. 3, § 102), held such stipulatio void. But Paul and Ulpian (D. 45, 1, 1,

(1) The penal clause does not represent the interest of the plaintiff in the first stipulatio; for the penalty is incurred, although the plaintiff have no interest in it (*etiam ei cujus nihil interest*, § 19). Nor is it so connected with the promise to which it is attached, that the promise being null, the penal clause is null; for, as is said in § 19, such clause might be attached for the very purpose of indirectly compelling the promissor in a stipulatio to fulfil a promise not binding upon him. In truth, the penalty stipulated for is the subject-matter of a distinct conditional contract, liability under which is to accrue if an anterior promise is not performed.

(2) It was not necessary to repeat, in the answer, all the words of the stipulator's question.

3, 4; D. 45, 1, 134, 1), held the inequality of the sums not to be a difference in the subject-matter of the contract, but a mere difference in quantity; so that, according to them, the answer squared with the question, and the stipulatio was a valid agreement for the smaller of the two sums, because *omne majus in se continet minus*.

Q. What if the question embraced several things, and the party answering promised only some of them?

§ 18. A. The stipulatio was good as to everything included in the answer, and void for the rest. For each thing constituted the subject-matter of a separate stipulatio; if the question, therefore, included several stipulations coupled together, but yet distinct, one of them might be good, though the other might be void from the want of a fit answer of the promissor.

Q. When the thing promised is not the thing asked for, is the stipulatio void?

§ 23. A. Yes: even when the parties use the same name to signify different things. If, *e. g.*, a party stipulate for the slave Stichus from me, and if by my answer promising him the slave, I intend Pamphilus, whose name I suppose to be Stichus, the stipulatio is void; but if the parties use different names to mean the same thing, it is valid.

Q. When is a stipulatio void on account of the condition attached to it?

§ 11. A. When the obligation is subject to a condition either impossible or *contra bonos mores*; *e. g.*, that a man shall touch the stars, or commit murder.

Q. What if the condition is the not doing an impossible thing; *e. g.*, the not touching the stars?

§ 11. A. This condition made the obligation absolute (p. 250) (1).

Q. What is a stipulatio *præpostere concepta*? Is it valid?

§ 14. A. One in which the time fixed for its execution precedes the happening of the condition, as thus: *If such a vessel returns to-morrow from Asia, do you promise to give me so and so to-day?* Now this is a contradiction in terms, for an obligatio must exist before one can be bound by it. Till Leo's reign such stipulatio was void: he held it binding in agreements as to *dotes* (dowries), and Justinian gave it the same effect as one simply conditional, and as if no period were attached to the promise.

(1) But when the thing not to be done was unlawful the obligation was void, for it would arise *ex turpi causa* (§ 24).

Q. When was a stipulatio void on account of the period fixed for its execution?

§§ 13, 16. **A.** Prior to Justinian it was void when its terms showed that it was not to be carried into effect until after the death of the parties interested; i. e., the promissor, or the stipulator, or the pater-f., who, having the stipulator under his power, would acquire through him the benefit of the obligatio. To stipulate for or to promise a thing for a period when either party will not be in existence, is the same as to stipulate for or to promise a thing on behalf of a man's hæredes. Now, although a claim or a liability might be transmitted to the hæredes of the contracting parties, still it could not take its origin in the person of such (1). Nevertheless, Justinian allowed the stipulatio in question all the effect which the parties intended.

Q. Prior to Justinian, could the moment of death be taken as a fixed period (*cum moriar vel cum morieris*)?

§ 15. **A.** Yes: the moment of death is the last moment of life (2); for persons alive are the only persons who die. Therefore, when this was the period taken, the obligatio, or the right to enforce it against the debtor, originated or vested in the creditor.

Q. When the stipulator or promissor died before the condition was fulfilled, was the stipulatio void?

§ 25. **A.** No: the rights of parties descended to their hæredes (p. 250).

Q. When a writing showed merely that some person had promised, but not that any question had been put, was that sufficient to prove a stipulatio?

§ 17. **A.** Yes: to say that some one had promised implied that the promise had been made with the solemnity required to make it valid and binding. viz., by answer to a

(1) But a man might stipulate for a thing, *post mortem suam*, thus: besides the stipulator and promissor, a third party, called *adstipulator*, was added, to whom, on his own behalf, the promissor made a promise, and who, after the stipulator's death, was to receive the thing promised, for which, however, he was accountable as *adjectus solutionis gratia*; for, observe, the *adstipulator* was a creditor of the promissor, but at the same time a mere *mandatarius*, or agent, of the stipulator and his hæredes.

(2) A fortiori, he was alive on the day previous; but yet, prior to Justinian, the day before the death could not be taken as the fixed period (§ 13). The reason was, that the day before was not known until the day after the death; but the same is true of the moment of the death. This is a mere subtlety.

previous question. It lay on him who denied this to prove that the forms had not been used.

TITLE XX.—OF FIDEJUSSORES (SURETIES).

Q. What is a *fidejussor*?

Pr. A. One who by stipulatio (1) guarantees that another will perform his undertaking (2). The object of a *fidejussio* was to secure the creditor (*ut diligentibus CAUTUM sit*) so that its value as such was increased by the number of the sureties.

Q. What sort of obligations might be secured by *fidejussio*?

§ 1. A. Every sort: *i. e.*, all obligations contracted *re verbis, literis* or *consensu* (3). Nor did it matter whether the obligatio, secured by a *fidejussor*, was a *civil* or a *natural* one; in this sense, at least, that a *fidejussor* might become security for the (*natural*) liability of a slave to his master or to a stranger.

Q. Did the liability of a *fidejussor* pass to his *heredes*?

§ 2. A. Yes (4).

Q. Might a *fidejussor* make himself liable for a future debt?

§ 3. A. Yes: the *fidejussio* might be created either prior or subsequent to the principal liability. But in the first case the liability of the *fidejussor* was suspended until the principal obligation arose.

Q. Could the liability of the *fidejussor* exceed that of the principal debtor?

§ 5. A. No: for that of the former is merely that of the latter, and the accessory can never exceed the principal. But his liability might be less extensive than the principal one. Thus, if the principal debtor owed 10, the *fidejussor* might promise 5, but not *vice versa*. So the *fidejussor* might

(1) A *constitutum* was when a man gave the same guarantee without stipulatio.

(2) Prior to Justinian, sureties were *fidejussores*, or *sponsores*, or *fidepromissores*. The last two scarcely differed except in name, but both were distinct from *fidejussores*. A man was *sponsor*, *fidepromittor* or *fidejussor* according as his answer to the creditor was *spondeo*, *fidepromitto*, or *fidejubeo*: but Justinian abolished these differences, which may be studied in Gaius, 3, § 127.

(3) In the old law the only obligatio to which *sponsores* or *fidepromissores* could be added was the stipulatio.

(4) But not that of the *sponsor* or *fidepromissor* (Gaius, 3, § 120.)

give a conditional guarantee, or one for a limited period, on behalf of a debtor who was liable absolutely, but he could not give an absolute guarantee for a liability which was either conditional or for a limited period.

Q. When there are several sureties for the same debt, to what extent was each liable?

§ 4. A. The old law held each liable for the whole debt, nor had he any claim for contribution against the others; so that the creditor might choose any one of the sureties, and might sue him for the whole. But the strictness of the old law was relaxed by various privileges (*beneficia*) in favour of sureties.

Q. What were these privileges?

A. *Divisio*, *cessio actionum cedendarum*, *ordo*, and *discessio*.

Q. What was *divisio*?

§ 4. A. It was a privilege introduced by Hadrian, by which the surety, against whom the creditor sought an action, might require the praetor in granting one against him, not to grant it for the whole debt, but only for a portion (1), so as to compel the creditor to sue each of the sureties for their portions respectively.

Q. Did such *divisio* affect all the sureties equally?

A. No: it affected only those solvent at the time of the *litis contestatio* (2). The shares due by those insolvent were charged on the others (*ceteros onerat*).

Q. Suppose one surety neglected to claim the *divisio* and paid the whole debt, had he any claim on his co-sureties?

A. No: unless he had obtained the *cessio actionum cedendarum*.

Q. What is that?

A. By that the surety might before paying (3) require

(1) *Ut pro parte in se detur actio* (§ 4). Thus the praetor protected sureties from contributing more than their share, not only by an *exceptio*, but by refusing to grant the original action for more than a part, provided the surety claimed the privilege (B. 4, t. 13).

(2) This took place *in jure* not *in judicio*, i. e., before the praetor when the action was granted; for, since the action was to be divided according to the number of solvent fidejussores, the solvency of each must have been determined before granting the action, or at least at the moment of doing so.

(3) Strictly the assignment was required to be made before payment, for payment extinguished the *obligatio*, and with it the *actio* attached to it.

the creditor to assign to him his actions, either for the purpose of compelling his co-sureties to refund to him the shares respectively due by them, or to enforce payment from the principal debtor.

Q. When the surety neglected to get the creditor's action assigned to him, had he no remedy against the principal debtor?

§ 6. A. Observe: if the surety became bound at the request of the debtor, he had an action (*judicium mandati*) against the debtor; if he became bound unknown to the debtor, he had an action *negotiorum gestorum* (t. 27, post); if, lastly, he became bound against the will of the debtor, or from motives of kindness (*animo donandi*), he had no action. But even where the surety had his action against his co-sureties to recover sums overpaid, he might still benefit by the *cessio actionum*, because the assignee of the actions could alone avail himself of pledges given to the creditors, or hypothecæ charged in their favour, in order to secure the original debt, and of any other advantages incident thereto.

Q. Explain *ordo* or *discussio*.

A. By this privilege, created or rather re-established by Justinian, sureties might require the creditor first of all to *break up* and sue the principal debtor when present, so that the sureties might be obliged to pay for him only such sum as he could not pay himself.

Note.—*Intercedere*, to become bound for another's debt; *satisdare*, to guarantee the obligation of the principal.

TITLE XXI.—OF OBLIGATIONS MADE LITERIS.

Q. What is an obligation made *literis*?

A. That which arises out of a writing. As by uttering certain words, a man gave an agreement the effect of a civil obligatio; so, by the use of certain writings, a man gave solemnity to his consent, and made it binding; in this way a contract was created *literis* or *scriptura*, as, in the former case, *verbis*.

Q. How was an obligatio contracted *literis* by the old law?

Pr. A. Justinian says it used to be *nominiibus*, but adds that these *nomina* were not used in his time.

The following account has been collected from Gaius (3, 129), Cicero, and other writers:—From very early times the Romans kept family ledgers (*tabulæ, codex*), in which the pater-f. entered his assets and liabilities, his

expenses and receipts (1). Now, all entries on the codex or tabulæ against the name of a specified debtor went by the general name of *nomina*: but between these various entries there was an important distinction. Some, indeed the larger proportion, were intended not to create, but merely to prove the existence of an obligatio: thus, an entry was made to the name or account of a person, that there had been lent or deposited with him such a sum; this entry did not of itself create an obligatio: it merely went to show that there had been a *mutuum* or a deposit. Such entries were called *nomina arcaria* (2). But there were other entries made in terms which of themselves created an obligatio, a contract *literis*. They were called *nomina transcriptitia*, and constituted what was called *expensilatio*.—This sort of contract seems to be derived from the *nexum*, that is, from the contract created *per æs et libram* (p. 234). Without any actual weighing, &c., these preliminaries were assumed to have taken place, and when by express and written agreement one of the parties made an entry in his ledger (3), *viz.*, that a certain sum had

(1) In order to secure the accuracy of this ledger, which was in fact a perpetual record of the family estate, a note was taken of the various transactions of the day in a waste-book, called *adversaria*, which was destroyed once in every three months (*vide* Cicero, *pro Roscio*, 3, § 2). Whilst the *adversaria*, therefore, were of no authority in a court of law, the *tabulæ* constituted one of the most satisfactory modes of proof.

(2) Credits out of the chest (*arca*), which shows that it was the delivery of the thing, not the entry on the books, that created the obligatio.

(3) Whilst the creditor entered in his ledger the sum as weighed and delivered to his debtor (*expensum ferre*), the debtor entered it in his as weighed and received by him (*acceptum referre*, *pecunia accepta relata*). Though it does not distinctly appear whether the agreement of both ledgers was a condition precedent to the existence of a contract *literis*, still we think that the consent of the person so bound was required to be given in writing. In a contract *literis* the following was probably the mode of procedure:—First, there was an exchange of written documents between the parties, as there was an exchange of words in a *stipulatio*: the person who intended to become creditor wrote to the other thus: *The 100 solidi which you owe me for the locatio, I have entered against you: "centum solidos quos mihi ex causa locationis debes expensos tibi tuli."* The other party wrote, saying, "I consent that you should enter against me these hundred solidi, *expensos mihi tulisti.*" Then came the *transcriptio* or entry of the operation in the creditor's

been carried to the debit of the other, as a sum weighed and delivered to him (*expensum ferre, pecunia expensa lata, expensi ratio*), such entry created an *obligatio literis*, just as the *stipulatio*, had it been used, would have created one *verbis*.

Expensilatio applied only when the subject-matter of the contract was a definite quantity, a sum of money (*pecunia certa*), and it raised the *condictio certi*.—Gaius (3, 128) tells us that *expensilatio* was twofold, i. e., that a creditor carried as *expensum* to the debtor's account, either a debt already due by the latter on some other account, viz., a sale, a *mutuum*, or a *locatio* (*a re in personam*), or a debt due by a third party to the debtor, so that a new debtor was put in place of the old one (*a persona in personam*). Hence it appears that *expensilatio* or *transcriptio nominis* was generally used to work a *novatio* by substituting one obligation for another (1), or one debtor for another (t. 29).

Q. Was not this *expensilatio* peculiar to Roman citizens?

A. Yes, it was, and part of the civil law (Gaius, 3, 133). Soon, however, besides the civil law, they began to recognize the law of nations. The provincials (*peregrini*) bound themselves by a species of recognizance called *syngrapha* and *chirographum* (2), in which the debtor, without stating the real ground of liability, merely declared it (*debere se*), or that he would pay a particular sum (*daturum se scribebat*, Gaius, 3, 134). These writings, which must not be confounded with mere instruments of evidence (3), constituted a contract *literis*, and raised a *condictio certi*.

codex. Hence the difference between the *expensilatio*, which might be between parties at a distance, and the *stipulatio*, which could not. For writing might be transmitted, but the formal words must be within hearing of the parties (Gaius, 3, 138).

(1) The *mutuum* bound a person to give back only the sum lent, neither more nor less; nor could interest be claimed unless the contract *re* was changed into one *literis*, including the interest. But, further, a creditor suing on the contract *literis* had only to prove that the forms of the *transcriptio nominis* had been completed; but a creditor suing on a *mutuum* had to prove that the money had been actually paid.

(2) *Chirographa* are writings emanating from a single party, the debtor, and *syngraphæ* (*cum scripta*) writings emanating from both parties, and in duplicate.

(3) Writings intended as mere proofs were called generally

Q. If a person bound himself by a written contract *literis* in consideration of money paid, which, however, was not paid in fact, had he any equitable means of relief?

A. Yes. The *transcriptio nominis* or *chirographum* was often prepared before the money was paid to the person who became bound. Hence, the money-lenders used to take advantage of this custom to relieve themselves from paying the whole or some portion of what they had promised; so that, the debtor being bound, however unjustly, by the writing obligatory, was liable to pay money never received. To remedy this abuse, which arose from an over-strict attention to the rules of the civil law, the prætors invented the *exceptio non numerata*, by which the creditor was compelled to prove that he had furnished the full consideration for the obligation (1). But this *exceptio* was only temporary, and after the lapse of a certain time, extended from one to five years by Marcus Aurelius, the obligatio *literis* resumed its original effect, and the creditor was no longer required to prove that he had paid the sum for which the *chirographum* was subscribed (2).

Q. What was the law as to the contract *literis* in Justinian's time?

A. At that time the *expensilatio*, the *nomina transcriptitia*, were never used, for the *chirographum* had become general: the law of nations had replaced the civil law. But as no particular form was required, the *chirographum* was used in the same sense as *cautio*; i. e., a written promise to pay a fixed sum. Hence Justinian, following

cautio, *cautiones*, which, in its widest sense, denotes every kind of security given to the creditor (p. 53), but more specially a written proof, a *probatory* document, and is synonymous with *instrumentum*.

(1) But generally, the defendant who pleaded the *exceptio* was the party who had to prove its truth: so that this was a violation of ordinary rules. This same *exceptio* was open to the promisor in a stipulatio, to the borrower of a *mutuum* who had given a *cautio*; and he who had given a written recognizance of his having borrowed a sum of money was allowed to set up against the holder of the recognizance this *exceptio*, in order to compel him to prove his payment of the sum claimed.

(2) During the time so allowed by law, if the creditor sued he was met by the *exceptio non numerata pecunia*; if he should not sue, the debtor might protest publicly against the writing, or might himself sue the creditor in order to recover it (C. 4, 30, 7, 14, 4).

Gaius, in describing a chirographum, tells us that if any one has acknowledged himself by writing a debtor (*debere se scripserit*) for a sum not paid to him (*quod sibi numeratum non est*), such writing raises an obligation (*scriptura obligatus*), and a *condictio*, which is suspended for a time by the *exceptio non numerata pecunie* (1).

Q. Did not Justinian diminish the time during which a person might set up the *exceptio non numerata pecunie*?

A. Yes: he reduced the time from five to two years (2).

TITLE XXII.—OF OBLIGATIONS BY CONSENT (CONSENSU).

Q. How many of such contracts are there?

A. Four. *Emptio-venditio* (purchase and sale); *locatio-conductio* (letting and hiring); *societas* (partnership); *mandatum*.

Q. Why are they called *consensual*?

A. All contracts are *consensual*, inasmuch as in all the consent of the parties is required, though in general mere consent is not sufficient to make them perfect (B. 3, t. 13). But these four are in a peculiar sense *consensual*, because raised by mere consent of the parties (*consensu*), and created by a mere agreement (*conventio*), without any delivery, writing, or stipulatio. Moreover, they may be created even between parties not present, by letter, or by an agent (*nuncium*), whereas verbal obligations can be created only between parties present (p. 258).

Q. Are there not other differences between *consensual* contracts and verbal obligations?

A. Yes. *Consensual* contracts are *bilateral* or *synallagmatic*; i. e., both parties become bound to each other; whereas a stipulatio, like *mutuum*, is *unilateral*; i. e., only one party is bound. The *consensual*, like the other *bilateral* contracts, are contracts *ex æquo et bono* (B. 3, t. 13, *fin.*), whereas the *stipulatio* and *mutuum* are contracts *stricti juris*.

(1) There was, therefore, even in Justinian's time, a contract *literis*, since the written acknowledgment of a debt created an obligation apart from any actual payment or stipulatio (*cessante scilicet verborum obligatione*).

(2) Instead of the *exceptio*, the debtor might set up, even after two years, the *exceptio dolæ*; but then the defendant had to prove the fraud.

Q. Did any agreement besides these four bind of itself, apart from delivery or stipulatio?

A. Originally none; for, excepting agreements of sale, *locatio*, partnership, or *mandatum*, all others were *nuda pacta*; i. e., raised no action, and therefore no liability. But afterwards the prætors attached actions to certain *pacta*, which thus became obligatory, and were called *prætorian pacta*; e. g., the *pactum constituti* (B. 3, t. 20), and *hypothecæ* (B. 3, t. 14, *fin.*). Moreover, the civil law made certain *pacta* binding, which were called *pacta legitima*, to distinguish them from those which did not bind, and raised no actions. Thus, the *pacta donationis* (B. 2, t. 7), and the *dotis constitutio* (B. 3, t. 15, n.), were binding by mere consent of parties, by the imperial Constitutions. Lastly, *pacta*, or agreements appended to contracts *ex æquo et bono*, at the time they were concluded (*ex continenti*) (1), were held to partake of the obligatory nature of the contract, and to be part of it, so as to be capable of being enforced by the action attached thereto (2).

Q. Did *nuda pacta*, i. e., not *prætorian*, nor *legitima*, nor *adjuncta*, have any effect?

A. They raised no action; but if not contrary to the laws, or *contra bonos mores*, they produced an *exceptio* against the plaintiff who had brought an action, which it was the object of the *pactum* to take away (B. 4, t. 13, p. 233).

TITLE XXIII.—OF EMPTIO-VENDITIO (SALE).

Q. What is sale?

Pr. A. A contract, by which one party binds himself to another to deliver, or to cause to be delivered, a Thing to such other, who binds himself to pay for it. It raises two *direct* actions, the one, *venditi*, or *ex vendito*, allowed to the vendor; the other, *empti*, or *ex empto*, allowed to the purchaser.

Q. When is this contract complete?

(1) If the *pactum* were subsequent in date to the contract to which it was appended, it remained *nudum pactum*, and raised only an *exceptio* (p. 233).

(2) One instance of such an incorporated agreement was the *pactum de retrovendendo* for redemption, by which the seller reserved to himself for a certain time the right to buy the thing back (*tit. seq.*).

A. Whenever the parties have agreed as to the Thing and the price, though the Thing has not been delivered, or the price paid. But after Justinian's time, if, during the treaty for sale, it was intended that the terms of sale should be drawn up in writing, the contract was not complete until such instrument was regularly prepared. Till then there was no sale; either party might change his mind and withdraw with impunity.

Q. Suppose an earnest (*arræ*) given?

Pr. A. By the old law earnest was only a sign or proof of a contract being completed (*argumentum emptionis-venditionis*), and neither contracting party could, even by sacrificing the earnest or its value, retire from a sale to which he had consented. By a Constitution of Justinian, earnest-money assumed the nature of a forfeit; so that either party might withdraw: the buyer by sacrificing the earnest, the seller by returning the double of it.

Q. In a sale, might the price be left to the arbitration of a third party?

§ 1. A. Yes. The price must be fixed; for an agreement would not bind if one party was free to determine the sum to be paid or received. But an obligatio is not the less an obligatio when the price is left to the arbitration of a third party, though it is a conditional one; for the sale is complete if the third party makes his award; it is void if he cannot or will not do so. So held the Proculeians and Justinian.

Q. What should the price consist of?

§ 2. A. Cash. When one thing is given for another, it is not a sale but an exchange.

Q. Was not this a disputed point?

§ 2. A. Yes. After much discussion between the Sabinians and the Proculeians (1), the opinion of the latter prevailed. Proculus argued that when one thing is given for another, it is impossible to tell which is the price, and and therefore who is the buyer and who the seller: a matter,

(1) The two great schools of Roman law. In Augustus's time, Antistius Labeo (of whom Proculus was afterwards the illustrious disciple) was distinguished for his attempts to enlarge the principles of strict Roman law; whereas Ateius Capito (whom Sabinus and Gaius acknowledged as their master) adhered with scrupulous fidelity to the legal doctrines as they had been handed down to him (D. 1, 2, 47).

however, which must be known, since the liabilities differ. The buyer must transfer the property in the price to the seller; but the seller is not exactly bound to transfer the property (1) in the thing sold to the purchaser; he is bound to deliver it on receiving the price, and if he is proprietor, such delivery transfers the property; but if he is not the proprietor, his liability is only to cause the purchaser (2) to have the thing (*ut habere liceat*); i. e., to procure him peaceable possession thereof, and to secure him from being dispossessed (3).

Q. The property in a Thing sold by its real owner is not, then, transferred to the purchaser by the mere sale?

A. No. The thing must be delivered and the price paid, or some satisfaction given to the seller (p. 74). Possession is what vests the property; the sale merely entitles a man to require that he shall be put into possession (4).

Q. At whose risk does the thing sold stand?

§ 3. A. At the purchaser's, from the completion of the sale, even though he has not been put into possession, and so is not yet proprietor. The purchaser, therefore, must bear the loss arising from any accidents, as he may claim the benefit of *alluvio* and such accretions. If the thing perish, the purchaser loses, and must therefore pay the price, though he has received nothing (5).

(1) Hence provincial land might be *sold*, for the quiritarian property (p. 14) was not required to be transferred; hence sale was part of *jus gentium*.

(2) To cause the *præstatio* thereof (B. 3, t. 13, p. 238).

(3) But, in case of exchange, 1, the one party is bound to transfer the property to the other; 2, until the former has executed his part of the agreement for exchange, it is *nudum pactum*: but after execution on the one part, it becomes an *unnamed* contract (B. 3, t. 13). The party delivering, however, cannot require the other to make delivery on his part: he can only claim back the thing delivered by *condictio* (p. 68), or he may sue for damages by an *actio præscriptis verbis*.

(4) If A. sells a thing to B., and then sells and *delivers* the same to C., C. is proprietor; but B. may sue A. for indemnity.

(5) For the loss of the thing sold destroys the liability to deliver, by rendering delivery impossible; but the liability to pay the price remains, for its subject-matter, not being *specific*, cannot perish. The maxim is, *res perit domino*; here, however, the proprietor, i. e., the seller in possession, is discharged, but the purchaser, who, before loss of the thing sold, might have sued in order to have it delivered, loses his action (p. 242).

Q. Are your observations confined to loss by accident?

§ 3. A. Yes; for the vendor is bound to preserve the thing, and therefore to bestow all the care of a good pater-f. on it. He is therefore responsible for any loss or damage occasioned by his neglect, and even for accidents, if he has taken the risk on himself (*si custodiam susceperit*), or if the time fixed for delivery has expired, or he has been summoned to deliver and has not delivered (*mora*, Ortolan, 2, 319). But the vendor, even when exempt from all responsibility, still continues owner until delivery, and must assign to the purchaser all his rights of action over or relating to the Thing; such as his *actio in rem*, *condictio furtiva* (p. 68), his *actiones furti*, against the thief, and *damni iniuriæ*, against the authors of certain damage (B. 4, t. 1 & 4).

Q. Might a sale be conditional?

§ 4. A. Yes: *e. g.*, it might be agreed that there should be no sale of a Thing, unless it proved suitable to the purchaser, within a fixed period (1). The sale was not complete, nor did the subject-matter thereof stand at the risk of the purchaser till the condition was fulfilled.

Q. Were not certain *pacta* often added to contracts of sale?

A. Yes (p. 85, B. 3, t. 22): *e. g.*, the *pactum in diem addictio*, an agreement by which the vendor reserves to himself the power of annulling the sale, if, within a certain time, he meets with a better offer; or the *lex commissoria*, by which the vendor may consider the sale null if the price is not paid within a certain time (2). But in both cases the sale was absolute, its defeazance conditional.

Q. What things may be the subject-matter of sale?

§ 5. A. Whatever is the subject-matter of commerce, whether it be or not the property of the vendor (3). A person may sell a thing in prospect, and even an expectation, as the cast of a net (4).

(1) *Certum*; for otherwise the execution of the agreement would depend on the purchaser's will, and there would be no liability.

(2) If the time is not fixed, the buyer, by tendering the price, may claim the thing at any time.

(3) A sale of another's property is good between the contracting parties. Hence the purchaser on eviction may claim indemnity from the seller: but the real owner may also sue *in rem* for his property.

(4) This is *spei emptio: rei sperata emptio* was, *e. g.*, where the price was so much a head for the fish caught.

A. Was the sale of a thing not *in commercio*, e. g., a free man, a *locus sacer*, always void?

§ 5. A. Not absolutely, unless the purchaser knew that the thing was not *in commercio*. If he did not, the sale was valid to this extent, that it entitled the purchaser as against the seller to an action *ex emptio*: not, indeed, to compel the delivery of the thing, but to obtain indemnity for any damage he might have sustained.

TITLE XXIV.—OF LOCATIO-CONDUCTIO (LETTING AND HIRING).

Q. What is *locatio*?

Pr. A. A contract by which one of the parties binds himself to procure for another the use or enjoyment of something, for a time agreed upon, or to do something for that other, for a certain consideration (*merces*).

Locator (letter) is the person who binds himself to furnish the thing, or his own labour (1): *conductor* (hirer) is he who binds himself to pay the consideration (2).

Pr. This contract, like sale, raised two direct actions, the *actio locati* or *ex locato* allowed to the locator, and the *actio conducti* or *ex conducto* allowed to the conductor.

Q. When was the contract of *locatio* complete?

Pr. A. By the mere consent of the parties, whenever the sum to be paid was fixed (3); as in a sale, this sum had to be fixed either by the contracting parties themselves or by a chosen arbitrator (t. 23).

Q. Was it not a case of *locatio* when a dress was sent to the tailor to be mended, leaving the consideration to be paid for future agreement?

§ 1. A. After much discussion it was held not to be a *locatio*; nor was it a *mandatum*: for that must be gratuitous. It was only an unnamed contract, raising an action *præscriptis verbis* (B. 3, t. 13).

Q. Is it a *locatio* when two persons agree that each shall enjoy or use the property of the other, e. g., that two neighbours shall lend each other their oxen to plough?

§ 2. A. No; for the recompense in a *locatio* must, like the

(1) A person, however, who undertakes to execute any work, e. g., to construct a building, is called *conductor*, and the person who commissions him *locator*; the hirer of a house *inquilinus*.

(2) When land is the subject-matter, the hirer is called *colonus*.

(3) Unless the agreement was to be in writing (p. 271).

price in a sale, consist of money. Nor is such an agreement a *commodatum*, for that must be gratuitous; whereas here there is a mutual loan. Hence there can neither be the *actio locati* or *commodati*. Therefore the lender has an *actio præscriptis verbis* to recover an indemnity for the wrong suffered by non-fulfilment of the agreement.

Q. Is it not often difficult to say whether it is a case of sale or locatio?

§ 3. A. Yes. Thus, when one has received land to be enjoyed in perpetuity, in consideration of an annual payment to the proprietor (*pensio, canon*), so that, as long as the rent is paid, the land shall not be taken from the tenant or his heredes, or the assignee of the tenant or his heredes. To put an end, however, to all doubts as to the nature of such an agreement, Zeno erected it into a special contract, *emphyteusis* (1), which differed both from a sale and a locatio, and the nature of which was defined by the terms agreed upon. In default of any agreement as to accidents, Zeno decreed that a total destruction should be at the charge of the proprietor, and that a partial loss should be at the charge of the *emphyteuta* (2).

Q. Is it a sale or locatio if Titius has agreed with a goldsmith that he shall make him rings of a particular weight and pattern, and shall procure the gold necessary for the purpose, and receive, say, 200 aurei?

§ 4. A. Cassius considered it a sale of the material and

(1) From *ἐν, φύτεω*, either because a new ownership was grafted on the real *dominium*, or because under this contract tenants obtained part of the uncultivated demesne lands in order to clear them, from the republic or municipia. Such lands were called *agri vectigales*, but afterwards, like those let by the emperor on similar terms, they were called *emphyteuticarii* (C. 11, 58, 61). The tenant in possession (*emphyteuta*) acquired a kind of servitude in the land (*jus emphyteuticum*), which gave him, subject to the payment of rent, the right to dispose of the land itself and its fruits; and he had a *vindicatio utilis*, for he was not *dominus*, p. 72) to recover it. The *jus superficium* exactly corresponded to *emphyteusis*, except that it was confined to things on the surface of the land (p. 82).

(2) In the former case, the *emphyteuta* ceased to pay rent, whereas the purchaser of a thing sold had to pay the price. In the latter, the *emphyteuta*, whatever might be the loss incurred, had to pay the rent due, provided the land subsisted; whereas a *colonus* had not to pay rent when the crop had been destroyed, by a blight, &c. The former case shows how *emphyteusis* differs from sale, the latter, how it differs from locatio.

a locatio of the handiwork. But it was ultimately held to be only a sale: though it was never doubted that if Titius had furnished the material and fixed the price for the handiwork the contract would have been a locatio.

Q. What is the extent of the liability of the locator and of the conductor?

§ 5. A. The extent of their respective obligations is determined by the terms appended to the contract; in default thereof *ex æquo et bono* (t. 22, p. 270).

The locator is bound to deliver the thing let, and to keep it in such condition that the conductor may make use of it during the whole period of the hiring. If, by any accident, he cannot deliver the thing or maintain the hirer in the enjoyment thereof, the contract is annulled, or the rent released. The locator must make good all damage to the conductor occasioned by the thing let, if such damage has arisen even from slight negligence of such locator.

The conductor must pay the sum agreed upon; he must act like a good pater-f., bestowing the greatest diligence in preserving the thing, and he must restore it at the end of the hiring. Moreover, he is answerable for any loss or damage to the thing by his neglect; but otherwise the thing let stands at the risk of the proprietor.

Q. Does a hiring end with the death of the hirer?

§ 6. A. No: it continues for the benefit of his hæredes during the residue of the time fixed by the contract; the general rule being that contracts bind, not merely the parties but their hæredes (1).

TITLE XXV.—OF SOCIETAS (PARTNERSHIP).

Q. Define partnership.

A. Partnership is a contract (2) by which the parties

(1) Not so the usufruct (p. 92). An usufructuary has a right *in re* (p. 88), but a conductor has no such right; he has only a *personal* right (*obligatio*) to compel the locator to supply the enjoyment (B. 3, t. 18, n.). Hence, if a locator alienate the thing let, the alienee (unless there be an agreement to the contrary) may evict the conductor, to whom he is not personally liable, though the conductor may sue the locator for any damage sustained; whereas the bare proprietor cannot evict the owner of the usufruct (B. 2, t. 2) who has a right *in re*.

(2) Therefore it requires consent of all parties. Hence, where several persons, without mutual consent, have an undivided share in a thing held in common, *e. g.*, a legacy, they are joint-owners, not partners, and have the action for *partition*, but not *pro socio*.

agree to put their goods or industry into a common fund, in order to share the resulting profits and losses.

Q. How many kinds of partnership are there?

Pr. A. The text mentions two: the *societas alicujus negotiationis*, confined to the sale and purchase of particular merchandise, as slaves or wine, and involving no profits or losses except such as result therefrom; the other, *totorum bonorum*, including all the goods, present and future, of the partners. There was a third, *alicujus rei* (§ 6), confined to one or more definite subject-matters: a fourth, of acquisitions (*universorum quæ ex questu veniunt*), including whatever the partners acquired by their industry or their economy, and therefore not including successions, legacies, and gifts. The parties are presumed to have entered into this last kind, if nothing has been said expressly as to the particular one intended. There was also a fifth, the *societas vectigalis*, for farming the public revenues.

Q. How was each partner's share in the profit and loss fixed?

§ 1. A. If the partners agreed as to the share of each, the agreement was the standard (1). If the share in the profits was fixed, and nothing was said of the loss, or *vice versa*, the amount fixed for the one determined that of the other (§ 3). If there was no agreement, each of the partners had an equal share in the profits and the losses (2).

Q. Might it be agreed that one of the partners should have a larger share in the profits than in the losses?

§ 2. A. This was a question: Mucius held such an agreement inconsistent with the nature of a partnership; but Sulpicius, whose opinion prevailed, held a contract of partnership valid, even though it provided that one of the parties should share in the profits without being liable to the losses, inasmuch as the industry of one partner might be so valuable as to entitle him in equity to a better position as partner than the rest; for the ability and experience of one partner may be of such importance to the others as to entitle him to be relieved from any further contribution (*sæpe opera pro pecunia valet*). Such an agreement, how-

(1) It was competent for the partners to agree that one should have two-thirds in the profits and losses.

(2) An absolute equality: not one proportional to the contribution of each partner, because the industry of a poor partner may be allowed to stand instead of capital.

ever, as this was not valid unless it applied to the profits and losses arising from the whole partnership transactions. For if the profits of one only were to be calculated, without taking into account the losses sustained on another, one of the partners might reap the profits, whilst another would sustain the losses. Such an agreement made the partnership *societas Leonina*, and it was void (D. xvii. 2, 29, 1).

Q. How was a partnership dissolved?

§ 4. A. 1st. By an *express intention*, on the part of one or more of the partners, to cease being partners. But if the act of retiring was unseasonable, or done *mala fide*, viz., in order to derive the exclusive benefit from any profit about to accrue to the partnership—if, e. g., in the partnership *tutorum bonorum*, one partner retired in order to reap the sole benefit from a *hereditas* proffered to him, the party retiring was obliged to put into the common stock the profit which he fraudulently intended to appropriate; but he was entitled to retain, for his own use, anything he did not so fraudulently attempt to obtain. As to the copartner to whom the fraudulent renunciation (*renuntiatio*) had been sent, any profit acquired thereafter was acquired by him for his sole benefit.

2nd. *By the death of one of the partners.*—This dissolved the contract, even as regarded the others, unless there was an agreement to the contrary (§ 5); because, though a man might be willing to form a partnership with *all* the copartners, he might possibly not be willing to form it with some only. The partnership did not continue with the *heres* of a deceased partner (1), for this contract was made with individuals, in consideration of personal qualities.

§ 7. 3rd. *By the confiscation (publicatione) of a partner's goods for a crime* (B. 4, t. 18); or by the *maxima* or *media diminutio capitis*, of which confiscation was a result (B. 3, t. 1; Gaius 4, 146; Ortolan, II., 513).

4th. *By cessio* (§ 8) (assignment), or by the compulsory sale of the goods of one of the partners (B. 3, t. 12) (2).

(1) No agreement was good by which a partnership was continued between a surviving partner and the *heredes* of one deceased, because a *heres* could not be bound against his will in a contract founded on mutual confidence and personal considerations. Although the partnership was dissolved for the future, the *heres* succeeded to the profits and the losses arising out of transactions prior to the dissolution.

(2) If the parties agreed to continue partners notwithstanding

5th. *By the close of the business-transaction* (§ 6) in respect to which the partnership was formed, or by the loss of the particular subject-matter thereof.

6th. *By the expiration of the term* limiting the partnership (§ 6).

Q. What action was raised, by the contract of partnership?

§ 9. *A.* The *actio socio* or *pro socio*, by which each partner might compel his copartner—1, to supply the partnership with whatsoever he had bound himself to supply; 2, to account for all profits he had made on its behalf; 3, to contribute to the expenses required for the safe keeping of the partnership property; and, lastly, to repair any damage caused by his own fraud or gross negligence; *i. e.*, by his not bringing to the partnership affairs the same diligence as a person applies to his own affairs; for nothing more could be required. For if one man forms a connection with another who is indolent and negligent, he has himself to blame for having made a bad selection (1).

the *diminutio capitis* or *cessio bonorum* of one of them, that would be the beginning of a new partnership (Gaius, 3, § 153).

(1) Damage may be occasioned by accident (*casus*), by superior force, from which no man can escape (*vis major*), or by the lawful or unlawful act of another.—Now, unlawful acts alone raise a liability. These, *i. e.*, acts contrary to law (*injuria*), causing damage, and raising liability, are: 1. *Dolus*, fraud, which always implies an intent to injure, and always raises a liability. 2. *Culpa*, an act of neglect, causing damage, but not implying an intent to injure. Now as to *culpa* it is clear, that though a man may be bound to do no positive act injurious to another, he is not equally bound to exert such diligence as to prevent damage to another. Hence *culpa*, if it was a positive act of neglect—an act of commission—raised a liability in most cases; but *culpa*, if it was a negative act of neglect—an act of omission—raised a liability only in certain cases*. Moreover, it is clear that negligence—want of diligence—admits of degrees, of which the Roman jurists recognised two: 1. *Culpa lata*, *culpa latior*, *magna culpa*, gross neglect—treated very much like fraud; *culpa magna dolus est, dolo proxima*. 2. *Culpa*, without any epithet, or *omnis culpa, culpa levis, levior*, or *levissima*, slight neglect.

But the question arises, by what standard are these degrees of

* The technical term for the diligence in question is *diligentia*; when applied to a thing corporeal, *custodia*; *negligentia*, or *omissio diligentia*, the want of it; *dolum* or *culpam præstare*, to be responsible for fraud or neglect.

TITLE XXVI.—OF MANDATUM (COMMISSION).

Q. What is a *mandatum*?

A. A contract, by which a person undertakes gratui-

culpa to be measured? Two obviously suggest themselves—both being adopted by the Roman jurists. For you may take either an *absolute* standard, *viz.*, mankind in general, or a *relative* standard, *viz.*, the character of the individual whose acts are in question; in other words, as the commentators say, culpa may be considered either in *abstracto* or in *concreto*. By the *absolute* standard a man will be guilty of gross neglect (*lata culpa*) if he has acted in such a way as no man of common sense would act, *non intelligere quod omnes intelligunt*; or you may test slight neglect (*levis culpa*) by the conduct of the most careful (*diligentissimus*) pater-familias. And we may observe, with the Digest, that no man is to be held responsible who has applied such extreme diligence (*exacta, exactissima*). By the *concrete* standard the measure of diligence is the individual whose acts are in question; so that a man is bound to apply diligence either equal to or greater than that which he usually applies to his own affairs. *Talem diligentiam adhibere qualem suis rebus adhibere solet.*

Lastly, we have to determine the principles according to which parties bound *ex contractu*, or *quasi ex contractu*, are liable for the first or second degree of neglect as tested by the first or second standard respectively. These principles are various; but the following may serve as a summary:—of parties responsible for slight neglect, *i. e.*, bound to bestow the same diligence as the most careful pater-familias, we have, 1. The *commodatarius* and the *depositor*, because the thing is lent or deposited for their sole benefit respectively. 2. The giver and receiver in the contract of *pignus*, the seller and purchaser in that of *emptio-venditio*, the hirer and letter in that of *locatio-conductio*, because their several contracts confer a mutual benefit. 3. The *mandatarius* (agent) and the *mandator*, because, though the latter is the only party benefited, still the contract of *mandatum* is undertaken from friendship (*manu datum*), and is held to imply a promise of diligence. 4. The *negotiorum gestor*, because his interference in the matter is voluntary. Of parties responsible for gross neglect, *i. e.*, such as no man in his senses would commit, or which a man would not commit in the ordinary management of his own affairs, we have, 1. The *commodans* and depositor, because they render gratuitous services, and because the depositor ought not to trust a negligent depositor. 2. Partners, joint owners, or coheredes in the management of their joint property, and the husband in that of his wife's *dos*, because they are managing their own property, and must suffer for their own neglect,—and this is properly re-

tously and from motives of kindness (1) an honourable and lawful commission. We say *gratuitously*, because a *mandatum* was essentially gratuitous (2); if a definite recompense were agreed for, it became a *locatio* (§ 13); and if the recompense were indefinite, it became an *unnamed* contract (p. 274, t. 24); we say from *motives of kindness*, because there was no *mandatum* unless the person commissioned was free to refuse it; for if he was not, it was a command or *jussus*; we say an *honourable and lawful commission*, because a *mandatum* was not obligatory when contrary to the laws and good morals, as, *e. g.*, if I gave you commission to rob or to injure Titius; for if you executed it, you would have no action against me, although you might have incurred penalties (§7).

Q. What actions are raised by a *mandatum*?

A. Two: 1. The *actio directa mandati* allowed to the mandator, whereby he gets indemnified for damage suffered by the non-execution or by the imperfect execution of the *mandatum* (3), and by which he compels the *mandatarius* to transfer everything acquired or received on occasion of the *mandatum*, and to assign his rights of action against third parties; *e. g.*, those to whom he has been commissioned to make loans; 2. The *actio contraria* allowed to the *mandatarius*, by which he compels the mandator to repay the sums expended and losses incurred by him on account of the *mandatum*, and in course of its execution, and secures himself against the actions of creditors, to whom he has become liable by reason of the same.

Q. How many ways are there of contracting *mandatum*?

garded as a security for their diligence. 3. Tutors and curators, because their duties are imposed upon them; but some texts in the Digest make them responsible even for slight negligence. The rules given apply only to culpa when there has been no special agreement: as to *dolus*, every person was bound *dolum præstare*, and an agreement to the contrary was void.

(1) The form described in Plautus (Captiv. ii. 3) shows this: *originem ex officio atque amicitia trahit*.

(2) But it would still be a *mandatum*, though the *mandatarius* (person commissioned) received some *honorarium*; thus, an advocate might receive his fee without ceasing to be a *mandatarius*: though he would have no action to compel payment; but the prætor or præses fixed the amount *extra ordinem* (§ 13, B. 4, t. 6).

(3) The *mandatarius* was responsible for slight negligence; the effect of his condemnatio was infamy (B. 4, t. 16).

Pr. A. Five: 1. For the sole benefit of the mandator; 2. For the mutual benefit of mandator and mandatarius; 3. For the benefit of a third party; 4. For the benefit of the mandator and a third party; 5. For the benefit of the mandatarius and a third party. A mandatum, for the sole benefit of a mandatarius is void.

Q. Give instances of a mandatum for the mandator's sole benefit.

§ 1. *A.* When one person charged another to transact his business, to buy a piece of land, or to be answerable for him (B. 3, t. 20, § 6).

Q. Give instances of a mandatum for the mutual benefit of mandator and mandatarius.

§ 2. *A.* If I commission you to lend money to my procurator; for here there is a benefit to you, your funds being lent at interest, and to me, because I am enabled to carry on my business (B. 3, t. 19, § 20); so there is a mutual benefit when your debtor commissions you to get a promise made to you (*stipulari*) at his risk by his debtor, whom he assigns to you as debtor (*delegat*), for the obligatio incurred by the assigned debtor works a *novatio* of the mandator's original obligation, and so he is discharged from it (t. 29, *post*), which is so far a benefit to him, for if sued at all it must be by virtue of the *mandatum*, in case the *delegatus* fails to pay; on the other hand, you are benefited by being entitled to sue first the *delegatus*, and then the mandator. The same benefit exists when a surety, whom you are about to sue, commissions you to sue the principal debtor at the risk of such mandator.

Q. In this last case the surety has a clear interest in commissioning the creditor to sue the principal debtor, for so he postpones his own liability; but what benefit does the creditor derive?

A. The reason will appear from the old law, by which the creditor might elect between the surety and the principal debtor; but having elected and brought an action against one, he could bring none against the other. Now, though by the mandatum from the surety (*fidejussor*) to sue, and by suing the principal debtor, the creditor of course lost the action, raised by the *fidejussio*, still he had the *actio mandati* against the surety if the principal debtor failed to fulfil his obligatio; so that he had an action against two persons successively. In later times, such a *mandatum* was never used. Justinian allowed the creditor to sue the debtor and the surety, the one after the other (B. 3, t. 20, § 4).

Q. When is a *mandatum* contracted for the exclusive benefit of a third party?

§ 3. *A.* When, *e.g.*, some one was commissioned to transact the business of Titius, to purchase a piece of ground, or to appear for him. Such a *mandatum* raised no *obligatio* directly, because the mandator had no interest in its being executed. But if the *mandatarius* did execute it, the mandator was bound to indemnify him; it might also happen that a mandator who had commissioned another to transact the business of a third party was responsible to the latter for the mode in which the business was done (t. 27), and might, therefore, be interested in the execution of the *mandatum*; so that there might be ground for the *actio directa* and *contraria mandati*.

Q. When was the *mandatum* contracted for the benefit of the mandator and a third party?

§ 4. *A.* When, *e.g.*, some one commissioned another to conduct business common to himself and to Titius.

Q. When was the *mandatum* for the benefit of the *mandatarius* and a third party?

§ 5. *A.* When, *e.g.*, a person commissioned one to lend at interest to Titius; if the *mandatum* had been to lend it without interest, the benefit would have been for the third party alone.

Q. When is a *mandatum* for the sole benefit of the *mandatarius*?

§ 6. *A.* When, *e.g.*, I commission you to spend your money on an immoveable thing, rather than in laying it out at interest. Now, this is not so much a *mandatum* as an advice which, if given *bond fide*, does not make me liable in any way to you, even though the advice should turn out badly. There was a question whether a person who commissioned Sempronius to lend his money at interest to Titius was liable to an *actio mandati*, and it was held that he was; it was thought that such a *mandatum* was more than mere advice, and that it bound the mandator, because, without the guarantee implied in the *mandatum*, the *mandatarius* would not have lent his money.

Q. What is the duty of the *mandatarius* in executing his commission?

§ 8. *A.* He must confine himself within its limits; for if he exceed, then he does something which he is not commissioned to do; therefore he does not execute the commission, and is liable to the *actio directa mandati*, but has no *actio contraria* against the mandator. If a person, therefore, commissioned to buy a piece of land for 100

sesterces, buys it for 150, he has no remedy against the mandator for the 150, and it was even doubted whether he could sue for the 100. The Sabinians allowed him no action whatever; but the Proculians allowed him one for the sum stated in his commission, and their opinion prevailed. A mandatarius, who bought the land for a sum less than that fixed, had his action; for a commission to purchase for 100, includes one to purchase for less if possible.

Q. How was a mandatam put an end to?

§ 9. A. 1. By a revocation on the part of the mandator before the commission was executed. 2. By the death of mandator or mandatarius, before the execution of the contract had been begun. If it had been begun, the mandatam was put an end to only for the future: the obligatio, and therefore the actio mandati, continued as to everything done either before the revocation or before the death. It was also held on grounds of utility, that anything done by the mandatarius whilst ignorant of the mandatam being revoked, or of the death of the mandator should be valid (1).

§ 11. 3. By the renunciation of the mandatarius, provided it was not made at an unseasonable time. For when the mandator was not informed in such time as to enable him personally or by agent to do that which the mandatarius was commissioned to do, he was prejudiced. Liability, therefore, continued (*actio mandati locum habet*), unless the mandatarius had a good excuse, as illness, or the insolvency of the mandator, for the mandatarius was not bound to sacrifice his own interests for those of the mandator.

TITLE XXVII.—OF OBLIGATIONS ARISING AS IF THERE HAD BEEN A CONTRACT (QUASI EX CONTRACTU).

Q. When do obligations arise quasi ex contractu?

A. When they arise, without any agreement in fact, out of certain circumstances, for the existence of which no one is to blame, and to which special provisions of law have attached such an effect as to make them bind the

(1) § 10. *E. g.*, Suppose my debtor, in ignorance that I have enfranchised the slave who had charge of my receipts, pays him money, the debtor is discharged, although the enfranchisement of that slave involves the tacit revocation of the mandatam to my debtors to pay the money to that slave.

parties, in the same way as if there had been a contract between them (1).

Such are the obligations arising out of the conduct of a business (*negotiorum gestorum*), or *tutela*, or the joint-ownership in a particular thing, or a *hereditas* not partitioned, or the existence of a legacy, or the receipt of that which is not due.

Q. Explain the *negotiorum gestorum*. What obligations and actions arise out of it?

§ 1. A. This was when a person mixed himself up voluntarily with the business of others, by managing or acting for them without their knowledge (2). The business being carried on in fact, the manager (*gestor*) and the principal, although no contract existed between them, were bound to each other. This doctrine was founded on public convenience, so that the business of absent persons might not be left uncared for when unforeseen necessity compelled them to leave in such haste that they had no time to commission an agent. For no man would undertake another's business unless monies advanced by him could be recovered.

The manager was bound to complete the business he had begun, to bring to the conduct of it all the care and prudence of a good pater-f. (p. 279), to render an account

(1) Obligations arise chiefly out of contracts and wrongs, and produce different effects in either case. But there are others arising out of neither contracts nor wrongs, which nevertheless are assimilated sometimes to those arising out of a contract, sometimes to those arising out of a wrong. When neglect is imputed, the party is bound *quasi ex delicto* (*suband. teneretur*): and in other circumstances he is bound *quasi ex contractu*. An obligation therefore is said to arise *as if out of a contract*, not because it arises out of an assumed consent attributed to the party liable, but because it involves the same consequences as if it arose out of a contract. Thus, how can it be presumed that the *heres* who is bound by the mere existence of a legacy, has consented to any liability, when he is *heres necessarius*? Therefore it is not the set of circumstances (*facta*) out of which the obligation arises which is assimilated to a contract, but the obligation itself and its effects which are assimilated to those arising out of such contract (p. 238).

(2) *Without their knowledge*. If the master knew of the interference in the business and did not object, there was a tacit *mandatum*. If the master knew and forbade the party's interference, such party had no action for anything done after such notice: nor could he recover any sum spent by him *animò donandi*.

and to pay over the excess of receipts over expenses, with interest for the remainder which he ought to have laid out. All this he was bound to do by the *actio directa negotiorum gestorum*. On the other hand, the *dominus* (he whose business is carried on), was bound, even without his knowledge or consent, to repay the manager, not indeed all sums expended, but all expended for purposes really useful at the time; to recover which the manager had the *actio contraria negotiorum gestorum* against his principal.

Q. Mention the obligations and actions raised by a guardianship (*tutela*).

§ 8. A. The tutor was liable for everything done and omitted to be done by him; and generally for even a slight neglect (D. 26, 7, 33, & 26, 7, 7, § 2). An *actio directa tutela* lay against the tutor when the guardianship was closed, either by the pupillus reaching full age, or otherwise (pp. 48, 50). Again, the tutor had an *actio contraria tutela* against the pupillus, in order to indemnify himself against all expenses incurred and engagements contracted by reason of the guardianship (1).

Q. Was not the curator entitled to an action to recover expenses incurred by him as curator?

§ 2. A. He had the *actio negotiorum gestorum utilis* to recover all his reasonable expenses on account of the curatorship.

Q. What obligations and actions were raised by the non-partition or joint-proprietorship of any Thing. *e. g.*, an *hæreditas*.

§ § 3, 4. A. When a thing belonged in joint property to several not being partners (B. 3, t. 25), he who took the fruits thereof was bound to account for them to the others, who, on their parts, were bound in proportion to their respective shares to indemnify him for any money spent on the joint property. Such obligations raised, as between the joint proprietors, the action *communi dividundo*; as between *co-hæredes* the action *familia erciscundæ* (B. 4, t. 17).

Q. For what degree of negligence was the managing joint-proprietor liable?

A. For *lata culpa*; *i. e.*, he was bound to bestow the same diligence as is usually bestowed by a man on his own business. Observe, however, that the *negotiorum gestor*

(1) Here the pupil is bound without the tutor's *auctoritas*, which he cannot give in his own cause.

was responsible for slight neglect, because the manager (*gestor*) had no joint interest in the property (t. 25, p. 280).

Q. What obligations and actions were raised by a legacy?

§ 5. A. The hæres was bound to pay the legacy bequeathed by the deceased, by the action *ex testamento* (1). Since his liability to the legatee arose neither from an agreement nor a wrong, and yet resembled the former in its effects, it is said to be an *obligatio quasi ex contractu* (2).

Q. What obligation and action were raised by the receipt of something not due?

§ 6. A. The receiver of a payment erroneously (3) made was bound to restore it by a personal action *condictio indebiti* (4).

Q. Suppose a man should pay with knowledge that nothing was due, had he *condictio*?

A. No: he was assumed to have made a gift.

Q. Suppose the man who pays is only morally bound to pay, is he entitled to the *condictio indebiti*?

A. No: it is not allowed, except where the purpose for which the payment was made has failed; but here the man discharges an obligation to which he is bound by natural justice, so that the payment attains its object (B. 3, t. 13).

(1) This obligation does not arise by *aditio*, for there are some hæredes, viz., *necessarii* without *aditio* (B. 2, t. 13). Even though the legacy be *per vindicationem*, the legatee may bring either a personal action *ex testamento* against the hæres, or an action *in rem* for the property (p. 160).

(2) But as to creditors of the hæreditas, the hæres was liable to them, not by any new action, but by the same *obligatio* which bound the deceased; for the action against the deceased passed by operation of law to the person of the hæres; observe, therefore, it was identically the same cause of action (p. 158).

(3) By mistake of fact at least.

(4) This is the *condictio* (proper) (p. 68), by which one claims that another shall transfer to him the property in a thing (*dare oportere*). Hence the delivery of a thing, though not due, clearly transferred the property, subject to the liability on the receiver's part to restore it. *Condictio* always lay when property had been transferred on a consideration which had failed (*sine causa* or *causa data, causa non secuta*) (B. 3, t. 13, *Permutatio*; vide p. 238, n. 1).

Q. Was the *condictio indebiti* allowed to one incapable of alienating?

A. No: The object of the *condictio* being to transfer the property to the plaintiff, the defendant must be assumed to be proprietor. But one incapable of alienation could not vest the property of a thing in him to whom it was delivered: the property remained in the alienor; hence the proper form of action was not the *condictio* but *vindicatio* (which assumed the property to be in the plaintiff), so long at least as the things continued *in esse*; for after they were consumed *bond fide*, the incapable alienor had the *condictio indebiti* against the receiver (p. 110).

Q. Does a payment of that which is not due to a person incapable of binding himself raise a *condictio*?

A. No: thus the pupil who receives without his tutor's authority that which is not due to him is not liable to the *condictio*, except for the amount of profit derived at the time of the *litis contestatio* (p. 111).

Q. Are there not cases where payment of that which is not due raises no action?

§ 7. A. Yes: when the payment is made in order to avoid a suit, however frivolous; for the payment has in such case a purpose. Thus, there are some obligations which the defendant cannot deny without making himself liable to the *condemnatio dupli* (B. 4, t. 6); for instance, legacies *per damnationem* before Justinian's time, and after his time legacies for pious purposes, *i. e.*, made on behalf of churches and other places of devotion. Now, if from the fear of being made to pay double by reason of the uncertainty of human judgment, the hæres pays such legacies, even though they be not due, he cannot claim anything back, because he has not paid without some reason, the ground being to avoid the chance of a suit, and for peace.

TITLE XXVIII.—THROUGH WHOM OBLIGATIONS ARE
ACQUIRED.

Note.—The same persons who acquire property for us acquire for us also *obligationes*; *i. e.*, the right to bring actions to enforce the claims; in short, through them we become creditors. It is unnecessary, therefore, to apply to the acquisition of *obligationes* what has been already said (B. 2, t. 9) as to the acquisition of corporeal Things through our filii-f. and slaves, or through the slave, of whom we have the

usufruct, or the *usus*; or, lastly, through a freeman or a slave, of whom we have the *bonâ fide* possession (p. 116). In applying, however, the doctrine of a pater-f. acquiring *obligationes*, through his filius-f., to the various *peculia* (p. 113), we must observe, that Justinian bestows upon the pater-f. the usufruct, and upon the filius-f. the bare property in the Thing to be recovered under a claim for the *peculium adventicium*; nevertheless, the pater-f. alone is entitled to sue (*actionem movet*) for such *peculium*; and it is the Thing recovered, not the *jus crediti*, which is to be divided into bare property and usufruct. Moreover, a man cannot acquire any *obligatio* by *procurator*, as he may possession (p. 115), nor can one contract for any person who is a stranger to his family (B. 3, t. 19, § 4, p. 259).

TITLE XXIX.—OF THE EXTINCTION OR DISSOLUTION OF OBLIGATIONS.

Q. In how many ways may an obligation be extinguished?

A. There is a distinction between those recognised by the civil law, which dissolve the obligation directly and absolutely, so that there is no longer a right of action; and those which dissolve it only indirectly, by means of an exceptio, which the debtor is entitled to demand of the prætor in order to repel the creditor's action (B. 4, t. 13). In the first case, the obligation is dissolved *ipso jure*: in the second, *exceptionis ope*. This title is confined to the former.

Q. How are obligations extinguished *ipso jure*?

A. Justinian mentions four ways: 1. *Solutio*; 2. *Novatio*; 3. *Acceptilatio*; 4. *Mutual consent* (1). There are, besides, 5. *Confusio*; 6. *Compensatio*; 7. *Tender (oblatio)*, followed by payment into court (*obsignatio, depositio*); 8. *Accidental loss of the Thing due* (B. 3, t. 14, § 2, p. 257).

Q. Explain *solutio* (loosening the tie or *obligatio*).

Pr. A. *Solutio* generally denotes every kind of discharge; but it is used here in a restricted sense, to denote the performance of that to which a person is bound.

Q. By whom may *solutio* or payment be made?

Pr. A. It must be by one capable of alienating that which he gives (p. 112); but it matters not whether it be made by the debtor or by another in his name, at his request, without his knowledge, or even against his

(1) The two first dissolve any obligation: *acceptilatio* only verbal obligations: mutual consent only consensual obligations.

will (1). The payment so made not only discharges the debtor, but also the debtor's sureties.

Q. To whom must payment be made?

Pr. A. Either to the creditor who is capable or duly authorised (p. 111); or to a person authorised by the contract itself (B. 3, t. 19, § 4), by a *mandatum*, or by virtue of his position as tutor or curator. It may be made without the will of the creditor, provided the whole debt be paid; for a man can neither pay one thing in place of another (2), or part of a demand, without the creditor's consent.

Q. Explain *novatio*.

§ 3. A. *Novatio* consists in substituting a new obligation, either natural (3) or civil, for an original liability. It operates by means of a stipulatio, concluded to the intent that it shall be substituted for an existing obligation; and since the fact of this intention is a matter to be proved by presumptions more or less conclusive, Justinian decreed that such intention should be formally expressed, and that, if not, the stipulatio should create a new obligatio without extinguishing the original one.

Q. How might *novatio* be effected?

§ 3. A. 1. By substituting a new debtor for the old one who was discharged. This was effected by a stipulatio concluded between the creditor and the new debtor, either without the knowledge, and even against the will of the original debtor (4), or by a *delegatio*, i. e., a *mandatum* (commission) given by the original to the new debtor to pay the debt (B. 3, t. 26, § 2). 2. By the substi-

(1) He who pays against the debtor's will, cannot claim back the money paid, unless the creditor has assigned to him his right of action.

(2) Justinian, however, allowed a debtor who could not find money to give his goods.

(3) A natural obligatio may be substituted by *novatio* for an original obligatio. The text (§ 3) mentions the case of a pupil operating a *novatio* without his tutor's authority; but we must presume that the pupil has been benefited by the change, for without authority he cannot bind himself naturally. A slave's promise, though it raises a natural obligatio, cannot work a *novatio*: for though a slave may have a promise made to him for his master's benefit (*stipulari*), he cannot himself promise so as to bind his master (B. 3, t. 17, t. 19).

(4) When the original debtor did not consent, the new debtor was called *expromissor*.

tution of a new creditor for the old one, which took place when the original creditor assigned (*delegare*) the debtor, who became liable to a third party. 3. Without the interference of any third party, *viz.*, by a stipulatio concluded between the same creditor and debtor. Such stipulatio worked a novatio only where it contained something new (*aliquid novi*); *e. g.*, the addition or the omission of a condition (1), or of a surety (2), or of a fixed period: if nothing was added, the original obligation was merely confirmed.

Q. Was there any other mode of producing a novatio except by stipulatio?

A. Yes: by *nominibus transcriptitiis* (B. 3, t. 21), and by the *litis contestatio*, at least when the proceeding was in *legitimo iudicio* (B. 4, t. 13); for after the formula was settled, and the direction to award condemnatio delivered to the iudex by the prætor, the demandant could not sue for the performance of the obligatio (*dare oportere*), but only for *condemnatio*, which, observe, was always a sum of money (*condemnari oportere*, Gai. 3, 180). But the novatio produced by the *litis contestatio* differed from that produced by agreement, in this: that the pledges, hypothecæ, and other incidents to the original obligation, continued incident to the new obligation produced by the *litis contestatio*.

Q. What was *acceptilatio*?

§ 1. A. A stipulatio by which, to a question of the debtor, the creditor answered that he considered himself paid. Justinian gives the formula: *Quod ego tibi promisi habens acceptum? Habeo*. This fictitious payment (*imaginaris solutio*) had the same effect as an actual payment, and, like that, it might be for the whole or even a part of the debt when made with the creditor's consent; but it could not be for a fixed time, or subject to a condition.

(1) If the new engagement was subject to a condition, the novatio was suspended till the condition was fulfilled.

(2) *Si fidejussor adjiciatur* (§ 3). *i. e.*, according to some, not if a surety be added in fact; for that could be done at any time without changing the contract; but if a contract be made with the additional clause that the debtor shall provide a surety. *Sponsor* is the word in the corresponding passage in Gaius, 3, 177. In Justinian's time *sponsores* were obsolete; but by the old law they were required to be parties to the same contract as the principal, so that, when *sponsores* were added, a new contract was produced, and therefore a novatio.

Q. Did this method of dissolution apply to every obligation?

§ 2. A. No: it applied only to obligations made *verbis*. But, to meet the case of other obligations, a method was introduced by *Aquilius Gallus* (prætor, B. C. 65), which consisted in substituting for the obligation to be dissolved a verbal obligation, and then extinguishing the latter by an *acceptilatio*. The following was the form of the Aquilian stipulatio, according to the text:—"Whatever, for any cause (1), you are or shall be bound (2) to give or to do for me, either now or at a future day (3), everything for which I have or shall have against you, actions personal (*actio*) or real (*petitio*), or right to have recourse to the *extraordinaria judicia* (*persecutio*) of the magistrate, everything of mine which you have, hold, or possess (4), or which you only do not possess through some wilful neglect of your own (5), whatever shall be the value of all these things,"—so much A. Agerius stipulated should be given him in money, and N. Negidius engaged to give it: on the other hand, N. Negidius put to Agerius the question, "All that I have promised you to-day by the Aquilian stipulation, do you acknowledge it as received?" and A. Agerius answered that he did.

Q. Explain dissolution by mutual agreement (*contraria voluntas*). What obligations may be extinguished by it?

§ 4. A. *Contraria voluntas* is the agreement of the parties to dissolve an obligation which they have contracted. It dissolves none but obligations *consensu*; the rule of the civil law being, that an engagement is dissolved in the same way as it has been created. Moreover, obligations are dissolved by mutual consent, only when things are still in their original state (*re nondum secuta*): for if, e. g., the thing sold has been delivered, an agreement to restore it would create a new contract, but would not extinguish the original one.

Q. Explain *confusio*.

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- (1) *Causa*, generic expression.
 - (2) Present and future.
 - (3) *Modes* of a contract.
 - (4) *Habes* referring to *vindicatio*; *tenes* to physical detention; *possides* to civil possession.
 - (5) *Dolove malo fecisti quominus possideas*, referring to the liability raised by the fraudulent destruction of a Thing, in order to prevent the owner reclaiming it. Thus it appears the formula applied to every possible case.

A. It occurred when the character of creditor and debtor united in the same person ; as, *e. g.*, when a debtor became hæres of the creditor, or *vice versâ*.

Q. Explain *compensatio* (set-off).

A. It occurred where one had a debtor and creditor account with another, and set off the items on one side against those on the other. By the old law set-off did not extinguish mutual debts *ipso jure*, except in actions *bonæ fidei* : in contracts *stricti juris* it raised only an exceptio.

Q. Explain *oblatio* followed by *consignatio*.

A. An obligation was thus dissolved when the debtor deposited, by permission of the judex, the whole debt after an ineffectual tender thereof to the creditor at a fitting time and place (C. iv. 32, 19 ; C. viii. 43, 9).

BOOK IV.

TITLE I.—OF OBLIGATIONS RAISED BY A WRONG
(DELICTUM).

Q. DEFINE a *delictum*.

A. An injurious and unlawful act, to which the law has attached a peculiar action (1).

Q. How are *delicta* divided?

A. Into *public* or *private*. Public, where the wrong-doer may be prosecuted by any citizen, the result being a *judicium publicum* (t. 18, *post*): private, when the wrong-doer may be prosecuted by certain parties only, in whose favour the wrong raises an *obligatio* and an action for money damages.

Q. Are obligations raised by wrongs divided like those raised by contracts?

Pr. A. No: they are all real, *i. e.*, raised (*ex re*) by some wrongful act (*maleficium*) constituting a *delictum*.—An intention to commit a wrong, whether proved by words or writing, cannot raise an obligation or an action.

Q. Mention the private wrongs.

Pr. A. 1. Theft (*furtum*); 2. Theft with violence (*rapina*); 3. Damage committed wrongfully (*damni injuria*); and 4. *Injuria*. Justinian devotes this and the three following titles to the discussion of them.

Q. Define theft (*furtum*) (2).

(1) It has been said that a *delictum*, as distinct from a *quasi delictum*, implies *fraud*, or the intention to injure. But we shall find that damage, caused by negligence, may amount to a *delictum*, though there be no formal intention to injure (t. 3, *post*), and that sometimes the *obligatio* and right of action arise not *ex delicto*, but *quasi ex delicto*, even in cases of fraud (t. 5). The reason is, because in Roman law it is the same with *delicta* (wrongs) as with contracts: no obligation can arise from a wrong (*ex delicto*) unless the injury has been specifically declared a wrong by law, and unless a particular action has been attached to it.

(2) § 2. *Furtum* or *furvum*, black, from being done secretly; or à *fraus ferre*, to carry away; or à *φῆρ*, a Thief, *φῆρεω*.

§ 1. *A.* It is the fraudulent (1) dealing or handling (*con-trectatio*) (2) either of the thing itself, or of the use or possession of the thing, for the purpose of deriving thereby a benefit (*lucri faciendi gratia*) (3).

Q. To constitute theft, then, it is not required that one should take a thing belonging to another and appropriate it?

§ 6. *A.* No: it is enough if a man misapply a thing without the consent of its proprietor, in order to derive some advantage thereby. Thus, a deposit^{ee} (*depositarius*) or a creditor holding a pledge, who makes use of such deposit or pledge, is guilty of a theft, viz., of the use. So it is with the borrower of a *res commodata*, who has received a thing for one purpose and uses it for another; e. g., if a man borrows plate, on pretence of inviting his friends to supper, and carries it off; or if a man borrows a horse as for a ride, and rides him further, or takes him to the wars.—As to the borrower of the *res commodata*, however, it is no theft, unless he misapplies it *knowingly* against the will of the proprietor: thus it is no theft if a man thinks himself sure of the proprietor's sanction, because the essence of the thing is wanting, viz., an intention to steal (*affectu furandi*, § 7).

Q. Even though a man thinks he is acting against the proprietor's will, is it theft if the proprietor consent in fact?

§ 8. *A.* No. Hence this question: Titius engages the slave of Mævius to rob his master, and to bring the stolen things to him (Titius). The slave tells Mævius: Mævius, in order to take Titius in the very act, allows his slave to carry the things to Titius: is Titius liable to the action (*judicium*) for theft (*furti*), or to the action for corrupting a slave (*servi corrupti*), or to neither? Clearly he is not liable to an action for corruption, because the wrong—the corruption—has not been committed. Some held him

(1) Page 102. Theft implies a removal, and therefore *moveables* alone can be stolen.

(2) Theft, therefore, presumes intention: so that a person under age cannot be prosecuted for theft unless he is very near full age (*proximus pubertati*, § 18), because until then he is not deemed to have discretion (B. 3, t. 19, p. 258).

(3) He who takes a thing not to benefit himself, but to injure another, or to damage it, does not commit a theft, but damage (*damnum*) or injury (*injuria*).

liable to an action of theft, others held him not, because the taking was not against the will of the master (Gaius, 3, § 198). But Justinian held him liable to an action both for theft and for corrupting a slave: he punished the attempt to commit the wrong, as if the wrong had been committed (*tanquam reipsa fuisset corruptus*, § 8).

Q. May a man commit theft by misappropriating his own property?

§ 10. A. Yes: where another is in the possession or the use thereof; as when a debtor steals his property pledged with his creditor.

Q. Can a freeman be stolen?

§ 9. A. Yes: it is theft fraudulently to take a freeman, being *alieni juris*: for the right of paternal authority makes *fili-familias* in some respects the property of their father.

Q. How many kinds of theft are there?

§ 3. A. Two: *furtum manifestum* and *nec-manifestum*. As to those recognised by the old law—*furtum conceptum*, *oblatum*, *prohibitum*, and *non exhibitum*—they are not so much peculiar kinds of theft as accidental circumstances supervening upon theft, and raising particular actions.

Q. When is theft said to be *manifestum*?—when *nec manifestum*?

§ 3. A. Notwithstanding a difference of opinion among the old jurists, it was ultimately settled that if a thief was caught in the act, or in the place where the theft was committed, or before he had reached the spot to which he intended to convey the stolen property, the theft was *manifestum*: under any other circumstances *nec manifestum*.

Q. Explain the *furtum conceptum* (1) of the old law.

§ 4. A. It denoted that the thing stolen had been found in the house of a receiver. But there was a distinction between *furtum* simply *conceptum* and *lance licioque conceptum*; when the thing stolen was accidentally found in possession of the receiver, or during a friendly search in his house, made by consent, it was *furtum conceptum*; which raised the action *furti concepti*, by which a *condemnatio* equal to thrice the value of the thing stolen was awarded against the receiver; but it was *furtum lance licioque conceptum* when the search was not friendly, but proceedings were had according to the solemn form of the law (*legis actio*). Now it was a principle of the old procedure, that

(1) *Furtum* sometimes denoted the thing stolen, as here.

the demandant should himself perform all acts of legal execution (1). A person then, making a legal search, was required to enter the house of the defendant with nothing on (*nudus*) but a linen girdle (*linteo cinctus*), to show that the thing stolen was not about him, and holding a dish (*lancem habens*, Gaius 3, 192), upon which the thing stolen, if found, was to be carried. If found, the receiver was punished as if he had been convicted of *furtum manifestum*.—Now, by the Twelve Tables, one guilty of *furtum manifestum*, if a freeman, was beaten with rods, and then assigned by law (*addictus*) to the person he had robbed, if a slave, he was cast headlong from the Tarpeian rock.—But the formal search, and the *actio furti lance licioque concepti* annexed to it were abolished, with the other *legis actiones*, by the *lex Æbutia*. Thenceforth the action *furti concepti* alone remained, for which the penalty was the threefold value, and a search with witnesses (§ 4) was substituted for that with dish and girdle.

Q. Explain the *furtum oblatum*.

§ 4. A. By the Twelve Tables, the *furtum* was *oblatum* when the possessor of stolen property (*furtiva*), anticipating a search for it, and wishing to make a third party responsible, brought and offered it to him, so that it might be found in this third party's house rather than in his own. This person in whose house the property was seized was entitled, as against him who had brought it, to the *actio furti oblata*, and to recover *condemnatio* amounting to the threefold value.

Q. Explain *furtum prohibitum* and *furtum non exhibitum*.

§ 4. A. These refer to two actions introduced by the prætors: the first (*furti prohibiti*) was for the fourfold value (Gaius, 3, 192) against him who resisted a lawful search; the second (*furti non exhibitum*), also probably for the fourfold value, lay against him who, though required, did not produce certain stolen property discovered by a subsequent search of his house.

Q. Did the civil actions *furti concepti* and *oblata*, the prætorian actions *furti prohibiti* and *non exhibitum*, continue during the later period of the law?

(1) Originally the Romans got justice for themselves; next, the law regulated the acts of private execution; next, symbols were used; next, the symbols became obsolete; lastly, public authority took upon itself to carry all executions into effect.

§ 4. *A.* No. Justinian says, that in his time they had become obsolete, because the old practice of searching had ceased (1). During later times, therefore, a person receiving and knowingly concealing a thing stolen was liable to the action *furti nec manifesti*.

Q. What obligations were raised by theft?

§ 19. *A.* Two: one to recover a penalty, the other to recover the Thing stolen.

Q. What was the penalty for Theft?

§§ 5, 19. *A.* The twofold value (*dupli*) for non-manifest Theft, the fourfold (*quadrupli*) for manifest Theft; the penalty was claimed (apart from the Thing itself) by the *actio furti*.

Q. How were the *dupli* and *quadrupli* calculated?

A. Not by the value of the Thing stolen, but generally by the demandant's interest in its preservation.

Q. Besides the thief, who was liable to the penalty?

§ 11. *A.* The penalty of non-manifest theft was incurred not only by the guilty receivers themselves, but also by those who gave counsel (*consilio*) and assistance (*et ope*) toward the wrong; *e. g.*, a person who upset another's money that a third might seize it, or who dispersed another's cattle that a third might make away with them, or who put a herd of oxen to flight by shaking a scarlet cloth. If, however, the wrong-doer in such cases acted from mere folly (*lascivia*), but with no intention to facilitate the theft, no *actio furti* was allowed against him, though there might be an action *in factum* for damages.

Q. Suppose a person, subject to a father or a master (p. 20), fraudulently took something from either of them, was that theft?

§ 12. *A.* Yes: for though neither father nor master could have an action against the thief, because of the unity of interest between the father and son, the master and his slave, still it was an act of theft and involved all its consequences, both as to the acquisition of the thing stolen by *usucapio* (pp. 101-2), and as to the penalty incurred by the thief's accomplice.

Q. Who might bring the *actio furti*?

§ 13. *A.* Any one who had an interest in the preservation of the thing, even though he were not proprietor; nor was the proprietor allowed it, unless he had an interest that

(1) In later times, the search was made by public officers.

the thing should not perish. § 15. Thus, if clothes sent to the fuller to be cleansed, or to the tailor to be mended for a certain sum, were stolen, the fuller or the tailor, not the proprietor, was entitled to the action; for the fuller and the tailor, if solvent, might be compelled to indemnify the proprietor for the loss of the thing in an *actio locati*; but if they were insolvent and could not indemnify the proprietor, he was allowed the *actio furti*, for then it was his interest that the thing should not perish.

Q. Did the same rule apply to the *commodatarius* (borrower paying nothing)?

§ 16. A. By the old law it did; for such *gratis*-borrower was bound to bestow the same care as the fuller and the tailor who are paid. But Justinian allowed the proprietor to bring either an *actio commodati* against the borrower, or an *actio furti* against the thief. If the proprietor, with knowledge of the theft, sued the borrower, the borrower had the *actio furti*; but if the proprietor sued the thief, the borrower was discharged.

Q. Suppose a thing given in pledge stolen, who had the *actio furti*?

§ 14. A. The creditor to whom the pledge was given, even though the debtor were solvent; for it was better for the creditor to have the pledge, than to bring a personal action against his debtor. And the creditor had the *actio furti*, even when the pledge had been stolen by the proprietor himself—*viz.*, the debtor.

Q. Suppose a thing originally stolen again stolen from the possession of a *bonâ fide* purchaser, who had the *actio furti*?

§ 15. A. The *bonâ fide* possessor, whether solvent or not (*omnimodo*), because he had an interest in its preservation, *e. g.*, to perfect his title by *usucapio* (p. 103). The *malâ fide* possessor had also an interest in preserving the thing, but he was not allowed to take advantage of his own wrong, by being allowed the *actio furti*.

Q. In case of a thing deposited, who had the *actio furti*?

§ 17. A. The proprietor and not the depositor, for the latter had no interest in its preservation, unless, indeed, such depositor had expressly taken upon himself the care of it; he was responsible only for his own fraud, and therefore not liable by the *actio depositi* to return the thing if it was stolen (p. 244).

Q. In case of a thing sold but not yet delivered being stolen, who had the *actio furti*?

A. If the vendor was guilty neither of fraud nor negligence, no obligation arose between vendor and purchaser (p. 272). It should seem, therefore, that the purchaser was the only person interested, and that he should have been entitled to the *actio furti*. But the Digest (D. 47, 14) allowed it to the vendor, on the ground that in order to maintain the *actio furti* the plaintiff must either be proprietor or holder (D. 47, 2, 80, 7), whereas the purchaser, in this case, was neither. Hence, the purchaser had not the *actio furti* until such action had been assigned to him by the vendor, who might be compelled thus to authorize the purchaser to sue in his name.

Q. How was the thing stolen recovered?

§ 19. A. The *actio furti* (action of theft) was purely penal (*ad pœna persecutionem*); but the proprietor (1), in order to recover the thing itself, had either an action *in rem* (*vindicatio*), or *ad exhibendum*, or *condictio furtiva* (2). The actions *in rem* and *ad exhibendum* lay against every possessor or against every individual who had ceased to be possessor by fraud (pp. 71, 111). The *condictio furtiva* lay only against the thief and his *heredes*; but they continued liable though they had ceased to be in possession of the thing, and though it had been lost by accident (3).

Q. Did the *actio furti* lie against the *heredes* of the thief?

§ 19. A. No: like other penal actions, it died with the wrong-doer (t. 12, *post*).

TITLE II.—OF GOODS TAKEN BY VIOLENCE (*RAPINA*).

Q. To what action is a person liable who has taken a thing by violence?

Pr. A. To an action of theft, for *rapina* is only theft

(1) Page 68. The creditor holding a pledge was the only non-proprietor who could sue.

(2) These three actions are cumulative remedies with the *actio furti* for the penalty; but a plaintiff had to elect between these three *persecutoria*.

(3) The *condictio* proper (the object of which was to transfer the property) was not generally allowed to a proprietor; but there was an exception, from hatred to thieves (t. 6, § 14).

committed with violence; but, besides, the prætors, considering *rapina* more criminal than mere theft, allowed a special action against *raptores*, called *vi bonorum raptorum*, the condemnatio attached to which was *quadruplum* (the fourfold value) for the first year after the act, and *simplum* (the single value) afterwards, whether the culprit was taken in the act or not (1).

Q. Are persons who forcibly possess themselves of things, and who are or believe themselves to be proprietors, liable to the action *vi bonorum raptorum*?

§ 1. A. No: neither to it nor to the *actio furti*: for there is no *dolus malus*. But, lest *raptores* should make this a pretext for violence, and in order to prevent men taking the law into their own hands, the imperial Constitutions decreed that any one taking possession by force of goods should lose his property in them if they belonged to himself; and if they belonged to another, though he might believe himself to be proprietor, that he should not only restore such goods, but also pay their value (2).

(1) When, therefore, the culprit was not taken in the act, the action *vi bonorum raptorum* increased the penalty, since the *condemnatio* for *furtum nec manifestum* was only *duplum*. But suppose the *raptor* caught in the act, and guilty of *furtum manifestum*, had there been no other *actio* except that of *vi bonorum raptorum*, the penalty would have been less than in an ordinary case of *furtum manifestum*—1. Because the *actio vi, &c.* was *mixed*, i. e. the quadruple value included both the penalty, which was really only the triple value, and the restitution of the Thing, which last was not included in the action of *furtum manifestum*. 2. Because the *actio vi bonorum raptorum* lay for one year only for the *quadruple* value, whereas the *actio furti manifesti* was perpetual (t. 12). 3. Because the *quadruple* value was not calculated, as in the *actio furti*, upon the interest of the demandant, but upon the actual value of the article. Therefore it should be observed, that though the prætor allowed a special action against the *raptor*, he did not refuse the ordinary *actio furti*. The plaintiff had his option: and he of course chose the *actio furti*, if the case against the *raptor* amounted to a *furtum manifestum*.

(2) These Constitutions apply both to moveables and to forcible entries on immoveables (*res soli*). The *actio vi bonorum raptorum*, like the *actio furti*, applied only to moveables; but, according to the old law, whoever made a forcible entry on land was liable to the interdict *unde vi* (t. 15), or to the *Lex Julia*, for violence public or private (t. 18, *post*).

Q. Who may bring the *actio vi bonorum raptorum*?

§ 2. A. Any one having an interest in the preservation of the thing, whether he has it *in bonis* or *ex bonis* (1). Thus it may be brought by a person to whom a thing has been let, lent, or pledged, or with whom it has been deposited, and who has undertaken the charge thereof, or by a usufructuary, or by the *bond fide* possessor, &c. And generally, wherever an *actio furti* would be raised by a theft committed secretly, an *actio vi*, &c., would be raised by a theft committed with violence.

TITLE III.—OF THE AQUILIAN LAW.

Q. What was the Aquilian law?

A. A plebiscitum passed (A. U. C. 468) on the motion of the Tribune Aquilius, which established the *actio* called *Legis Aquiliæ*, or *damni injuria*, because it awarded punishment for damage wrongfully caused (*damnum injuria factum*, D. 9, 2, 3).

Q. State the provisions of this law.

Pr. A. It contained three heads. 1. That any one who wrongfully (*injuria*) killed another's slave, or a four-footed beast amongst those called "cattle" (*pecudum numero*) should be condemned to pay to the proprietor a sum equal to the highest price which the thing had reached during the year preceding.

Q. What are included under the word *pecus*?

§ 1. A. All fourfooted beasts which feed in herds—as horses, mules, asses, sheep, oxen, goats, and swine.

Q. Why do you say *wrongfully killed*?

§ 2. A. Because a person was not liable to the *actio legis Aquiliæ* unless he had not merely caused some damage—had not merely injuriously affected the estate of another—but had caused it whilst doing an act he had no right to do (*nullo jure*, § 2). Thus, a person was not liable if he killed a robber only to protect himself.

Q. What if a man killed a slave by accident?

§ 3. A. He was not liable to the *actio legis Aquiliæ* unless he had been guilty of some neglect (*culpa*); but neglect, however slight, would make him liable, though he might

(1) A thing is *in bonis* when a man holds as proprietor; *ex bonis*, when a man has certain rights, or is under certain liabilities as to the thing which would be affected by its loss.

have had no intention to injure. If, therefore (§ 4), a man practising with a lance pierced a slave who was passing by, the question of his liability would depend on circumstances: if the person who threw the lance was a soldier, and if he was in a place set apart for practice, he would not be guilty of negligence, and therefore not liable: but if the person in question was not a soldier, or in a place not set apart for practice, he would be guilty of negligence, and therefore liable to the action and penalty of the *lex Aquilia*. So (§ 5), if a man pruning let a branch fall and killed a slave passing near the tree, the question would be, whether this happened near a road; for if it did, and the man pruning did not call out and warn the persons below, he would be guilty of negligence and liable to the actio in question; but if he did call out, and the slave took no heed, he would not be held negligent or liable. Nor, again, was the man pruning liable if he was working away from the road or in the middle of a field, inasmuch as a stranger could have no right to come that way. So (§ 6), a medical man who operated upon a slave, but did not finish his cure, and thereby caused the slave's death, was liable to an actio *legis Aquiliæ*.—Unskilfulness, or even weakness, might amount to such neglect as to make a man liable to this action, where a person undertook something beyond his powers; when, *e. g.*, a surgeon performed an operation so unskilfully as to cause the death of a slave, or when a man mounted a horse which he could not manage (§§ 7 & 8).

Q. Explain the effect of these words in the law: "the greatest value the thing possessed at any time during the year."

§ 9. A. Suppose a person killed a one-eyed or drunken slave: now if, during any part of the year before his death he had been sound, such person would have to pay, not his last price, but his highest price during that year. Hence this actio is said to be penal, because the condemnation is sometimes greater than the amount of damage inflicted. Hence also, it did not lie against the *hæredes* of the delinquent (1), as it would have done if its single object had been to indemnify the demandant.

Q. In applying the *lex Aquilia* was the owner of the Thing entitled to more than the value of the Thing by itself?

(1) Except so far as they might have been enriched by reason of the wrong (D. 9, 2, 23, 8, t. 12, *post*).

§ 10. *A.* There was no express provision on the point, but by construction it was held that regard was to be had not merely to the absolute or abstract value of the chattel, but to its relative value. Thus, if your slave was killed after having been appointed *hæres*, and before acceptance, regard was to be had to the value of the *hæreditas*, which, had the slave lived, would have come to the master. So, if a mule was one of a team of four, the diminished value of what remained was taken into consideration.

Q. When a slave was killed, could the murderer be sued otherwise than by the *actio legis Aquiliae*?

§ 11. *A.* Yes: the master might either sue for the pecuniary penalty under that law, or he might prefer a capital charge (C. 3, 35, 3) (1).

Q. Explain the second head of the *lex Aquilia*.

§ 12. *A.* Gaius (3. 215) tells us it gave an action against the *adstipulator* (p. 262) who, in order to defraud the person to whom the promise had been made (*stipulator*), released the debt to the promisor, discharging him by *acceptilatio*. This second head was practically unknown in Justinian's time, who rendered *adstipulationes* useless (B. 3, t. 19, *prope fin.*).

Q. Explain the third head of the *lex Aquilia*.

§ 13. *A.* It gave an action for all kinds of damage other than those specified in the two first heads. Thus, if a slave or a beast of the class *pecus* was wounded, or if any four-footed beast, not being of the class *pecus*, as a dog or a wild beast, or a bear or a lion, was wounded or killed, it was this third head that gave an action. It also provided a penal remedy for all damage wrongfully caused to any other animal or any inanimate thing. In short, it gave an action against any one who broke, burnt, or destroyed, or injured in any way Things belonging to any other person.

Q. Was the action under this third head allowed where there was no fraud?

§ 14. *A.* As under the first head, so under this, an action lay not only where there had been fraud, but where there had been neglect.

Q. What was the condemnation under this third head?

§ 14. *A.* The highest value which the article had reached during any of the thirty days preceding the damage. The

(1) By the *lex Cornelia de sicariis* (t. 18, *post*), a thief might also be prosecuted both civilly and criminally.

law did not expressly say the *highest value*, but merely *value* (§ 15); but it was held, in accordance with the opinion of Sabinus, that *plurimi*, expressed in the first chapter, was to be understood in the third.

Q. Did the *lex Aquilia* allow an *actio directa* against those who had caused damage except by some sort of physical contact?

§ 16. A. No: the damage must have been caused by one body striking another (*corpore corpus læsum*, § 16 *in fin*): the damage to a body by other means raised an *actio utilis*. For the *lex Aquilia* punished the damage done (*damnum factum*), that is, strictly speaking, damage caused, not indirectly, but by a person *suo corpore*, i. e., by actual contact, either by means of his body or some instrument used by him. It was only by analogy, therefore, and by construction, that the *lex Aquilia* was held to apply to one who had caused damage otherwise than by actual contact (1), e. g., by confining another's slave or cattle till they perished of hunger. Thus the *actio directa legis Aquiliæ* was raised if A. pushed B.'s slave from the top of a bridge or bank into the river, so that he was drowned; but an *actio utilis* only was raised if the slave had been persuaded to go down into a well, or to get up into a tree, from which he fell.

If a body was neither the active nor the passive instrument in the damage; if, e. g., a man touched with compassion unbound a slave so that he might escape his master's wrath, no *actio*, either *directa* or *utilis*, was raised by the *lex Aquilia*, but an *actio in factum*, which the prætor allowed to one who had wrongfully suffered damage under circumstances other than those provided for by the *lex Aquilia* (t. 5, *post*).

TITLE IV.—OF INJURIAE.

Q. Explain *injuria*.

Pr. A. *Injuria* denotes generally everything done contrary to right (*quod non jure fit*): specifically, anything prejudicial to another, as in the *lex Aquilia* (*damnum injuriæ* or *injuria datum*); or injustice done by a magistrate or a judge (*iniquitas et injustitia*); or an insult (*contumelia*, ὕβρις), as in this title.

Q. How do *injuriæ* arise?

(1) *Causam præstitit*: indirectly caused damage.

§ 1. *A.* From any act, by which one man intentionally (*dolo malo*) offends another either by word (1) or act, as by slandering his honour or reputation; or by defamatory libels against him; or by causing the goods of another to be attached for a debt known to be fictitious; or by attempting the chastity of an honourable woman (*matrem-familias*, D. 50, 46), or by soliciting a boy still wearing the *toga pre-texta* (2).

Q. Is it only in person that we may receive injuriæ?

§ 2. *A.* We may receive an injuria not only in person, but also through those whom the delinquent knows to be under our power or protection. Thus, when a *filius-familias* is injured, the *pater-familias* has two actions: one in his own right for the injuria done to himself, the other in right of his son for the injuria done to him. By injuring a woman you may injure both the ancestor, to whose power she is subject, and her husband; the same injuria may therefore raise three actions, or even four, if the woman injured is the wife of a *filius-familias*: for then the injuria would also affect the father of the husband. An injuria to the husband does not affect the wife: for the husband is not properly under her protection, but she is under his.

Q. Who is the sufferer in the case of injuriæ to slaves?

§ 3. *A.* A slave cannot receive a personal injuria (3): the injuria is to his master; but an act which would be an injuria to him if inflicted on his *filius-familia* is not necessarily so if inflicted on his slave: the alleged injuria to the slave must clearly involve an insult to the master. If, therefore, offensive language has been addressed to the slave, or he has even been struck with a fist, no action is allowed to the master; but if the slave has been beaten to excess, the master will be considered injured and have his action (§ 4).

Q. If the slave who suffered injuria had several masters, did each master have an *actio* in proportion to his share in the slave?

§ 4. *A.* No: each master might bring a separate *actio* in respect of the injury to himself, and each might recover damages (*condemnatio*) in proportion to his personal consideration (*ex dominorum persona quia ipsis fit injuria*).

(1) *Convicium* (D. 47, 10, 15, 4), anything which publicly insults another.

(2) Boys and girls left off wearing that dress at the time of marriage, or after sixteen.

(3) At least strictly; but there were certain exceptions.

Q. When the bare property of a slave belongs to one, and the usufruct to another, who is the party injured?

§ 5. *A.* The bare proprietor, at least generally (*magis*): although the usufructuary would be entitled to the *actio injuriarum* if he was the person intended to be injured.

Q. Did the same rule apply to the *bond fide* possessor?

§ 6. *A.* Yes: the possessor could not sue for an *injuria* unless the delinquent intended to injure him by injuring a free man or the slave of another in his *bond fide* possession; but generally, the *actio injuriarum* belonged to none but the man himself if a freeman was injured, or to the slave's master if he was a slave.

Q. How might one sue for an *injuria*?

§ 10. *A.* Criminally or civilly: criminally, for corporal punishment (1); civilly, for *condemnatio* (damages) by bringing either the *actio injuriarum* invented by the prætor. and therefore called *honoraria* (2), or the action allowed in certain cases by the Cornelian law (§§ 7, 8).

Q. When the *actio honoraria* was brought, how was the amount of the *condemnatio* regulated?

§ 7. *A.* According to the sum fixed by the demandant himself; and though the *judex* could not exceed this, he might award less, having regard to the rank and consideration of the party injured.

Q. In what cases was the *actio legis Corneliæ* allowed?

§ 8. *A.* When a man was beaten or maltreated, or his house (*domum*) violated. But in such cases the amount of the *condemnatio* was left to the *judex*.

Q. When was an *injuria* said to be *atrox*?

§ 9. *A.* Either because of the act itself, as when it arose from wounds or blows; or because of the place where it was committed, as, for instance, the theatre or the forum, or in presence of the prætor; or because of the person injured; *e. g.*, when a magistrate or a senator was

(1) In criminal process, a person could neither prosecute nor defend himself by procurator (attorney); but Zeno, in actions *injuriarum*, allowed an exception in favour of persons *illustres* (§ 10).

(2) According to the Twelve Tables (§ 7) the penalty for *injuriæ* was a limb for a limb; for a bone fractured or bruised, 300 asses in the case of a freeman, and 150 asses in the case of a slave. The penalty for all other injuries was only 25 asses. Pecuniary penalties, says Gaius (3, § 23) seem to have been thought sufficient when the people were very poor; but all such provisions ceased when the prætors introduced their *actio injuriæ*.

injured by a man of low condition, or when the person injured was an ancestor or a patron; lastly, because of the part of the body injured, as, for instance, the eye. But it mattered not whether the person injured was a *pater-familias* or *filius-familias*; that neither increased nor diminished the nature of the injury (1).

Q. Was the man who committed the injury the only one liable to the *actio injuriarum*?

§ 11. A. No: he was also liable at whose instigation or under whose orders the injury had been committed.

Q. How was the *actio injuriarum* extinguished?

§ 12. A. By a release, though tacit (*dissimulatio*), e. g., by the person injured neglecting to sue either within the time fixed, i. e., within the year, or before his death (t. 12, *post*).

The action for injury never arose at all if there was no feeling of resentment on the part of the person injured; so that if a man once treated an injury with contempt, or seemed not to feel it, he could not afterwards revive a ground of offence which had been abandoned.

TITLE V.—OF OBLIGATIONS ARISING QUASI EX DELICTO.

Q. When do obligations arise *quasi ex delicto*?

A. Whenever unlawful and injurious circumstances, raising obligations, have not been specifically provided for by law, and have had no action attached to them. For besides *delicta* actionable either by an *actio furti*, an *actio legis Aquiliae*, or other special actions, there are certain culpable *facta*, the penalty for which may be sued for by a general and common action, *actio in factum*. The obligation is therefore said to arise *quasi ex delicto*, because the fact which raises it, though not declared by law *delictum*, and

(1) Justinian does not explain how the *atrocit*y of an *injuria* became important. Gains (3, § 224) notices a difference in the procedure, which probably had ceased to exist in Justinian's time, for he does not allude to it; but though he has pointed out those circumstances of aggravation, he did so probably only to explain what considerations were to enter into the mind of the *judex* in settling the *condemnatio*; and this seems to follow from the words of the text: *aliter enim senatoris et parentis patronique, aliter extranei et humilis personae injuria aestimatur*. It is clear that a freed-man could not sue his patron, nor the child the ancestor under whose power he was, except for severe injuries (*atroces*).

though no special action is attached to it, produces results similar to those which would be produced by a delictum (B. 4, t. 1).

Q. Give examples of obligations raised *quasi ex delicto*.

Pr. A. The Institutes mention as such the case in which a judex acts at his own peril (*si judex litem suam fecerit*); the case of one throwing or spilling something from a house abutting on the public way (*dejectum effusumve aliquid est*, § 1); or of something so hung or placed that its falling on the public way would be dangerous to the passers by (*positum aut suspensum habet*, § 1); and the case of a theft or damage committed on board ship or in a tavern (§ 3).

Q. When does a judex act at his own peril?

A. When he gives an unjust sentence, either fraudulently (*dolo malo* D. 5, 1, 15, 1), i. e., from malice, favour, or corruption, or even by ignorance (*imprudentiam*)(1).—A man is said *facere litem suam*, to make the cause affect himself, because, being responsible for his decision, he takes upon his own head the risk of the suit. The party injured by the unjust sentence may have against the judex an *actio in factum*, by which he will be condemned to pay an indemnity, the amount of which must be determined by the judex before whom such action is tried (*in quantum de ea re æquum religioni judicantis videbitur*) (2).

Q. Does not the action against the judex interfere with the conclusive effect of the *res adjudicata*?

A. No: for that which has been adjudged binds none, except the parties to the suit; now the judex who is defendant in the new suit was no party to the first.

(1) I. e., by a mistake of the law (D. 49, t. 8).

(2) Under the Empire, the party cast in a suit might generally appeal against the decision within a certain time. Sometimes this was unnecessary, as when the decision involved an absolute violation of the law (D. 49, 1, 5, 19); the decision was then considered null, and a fresh suit might be begun (*causa de novo induci potest*), that is, in the process by *formula*, a new action might be required from the magistrate, and without the necessity of any appeal (*sine appellatione*) or even after an appeal had been entered, if such appeal was quashed by lapse of time (*et præscriptione summotus sit*). It was the same in case of a *venal* decision obtained from a judex by corruption. The party entitled either to an appeal, or to consider the judgment null, might also sue the corrupt or ignorant judex, if he preferred so to do, instead of a second suit against the defendant.

Q. Why was such severity adopted against a judex who mistook the law?

A. Because he might consult the prudentes, who were officially authorised to answer questions of law (p. 6), or the magistrate who had referred the action to him, and thus avoid the responsibility arising from an error in law.

Q. Why did damage occasioned by want of skill or imprudence on the part of a surgeon, constitute a *delictum*, whilst the wrong occasioned by the decision of an unjust judex raised only an *obligatio quasi ex delicto*?

A. Because (p. 302) the culpable intention, the deceit, was not essential to the *delictum* in Roman law, and because the ground upon which the damage caused by an unskilful surgeon constituted a *delictum*, even when he was chargeable with no evil intention, was that the damage arose from an injury inflicted on a body (*corpus lesum*), which came within the provisions of the *lex Aquilia*, whereas the iniquity of the judex neither destroyed nor deteriorated any *physical* or *corporeal* thing; so that the *lex Aquilia* could not apply, and therefore an *actio in factum* was the only remedy for such injustice.

Q. Explain the obligation raised by throwing or spilling things on the public road, and the action enforcing it.

§ 1. A. When anything was thrown or spilt from a room upon the public road, and any one thereby suffered damage, the head of the family inhabiting the room, either as proprietor or as tenant, at a rent or gratuitously, was bound to pay double the amount of the damage: if the falling object caused the death of a freeman, the penalty was fifty aurei; if the person was only wounded the penalty was left to the discretion of the judex, who took into consideration both the expenses necessarily occasioned by the accident, and the disability to work involved. The penalty was recoverable by an *actio in factum* (1).

Q. What *obligatio* was raised from something having been placed outside or suspended over the public road, which might cause injury by falling?

§ 1. A. He who so placed or suspended the thing, or

(1) This action, observe, is based not upon the fact that the master of the room has himself thrown or spilt anything, for that would be a *delictum* by the *Lex Aquilia*, and he would be liable in the *actio legis Aquiliae*, but upon the fact that he is to blame for not having exercised a proper surveillance over his household.

allowed it to be so placed or suspended, was bound, even though it did not tumble, and though no damage occurred, to pay ten aurei. Here the *actio in factum* was *popularis* (public), i. e., any citizen might bring it.

Q. Suppose a *filius familias* had a separate dwelling from his father, and he threw or spilt things from his apartment, or had anything placed or suspended over the public way—what then?

§ 2. A. No action could be brought against the father, because he was not to blame: but the *filius-f.* was liable to an action *in factum*. Not even an action *de peculio* lay against the father, because such action was never given in case of penal obligations (t. 6, *post*). So if the *filius-familias*, from ignorance, gave a wrong judgment, the father was not liable, but the son alone.

Q. What obligatio was raised by a theft or damage committed on board ship, or in a tavern, or stable?

§ 3. A. The master of the ship (*exercitor*), or the tavern, or stable, was liable in an action *in factum* to pay the double value, though he himself had not committed the theft or damage, provided they were committed by one in his establishment(1), for he was to blame for having taken into his service dishonest persons.

Q. Did this action *in factum* pass to the *hæredes*?

§ 3. A. It passed to the *hæredes* of the person who had suffered the damage, but the *hæredes* of the person liable were not themselves liable. And this is the chief point of similarity between the obligations arising *quasi ex delicto*, and those arising *ex delicto*.

TITLE VI.—OF ACTIONS.

Q. How was justice administered at Rome?

A. Three different systems of procedure succeeded each other:—1st. The actions of law (*legis actiones*), which were abolished, at least partly (2), by the Lex Æbutia, and the

(1) If the theft was committed, or the damage caused by one not in his service, another action lay for indemnity, but the obligation of the captain or of the tavern-keeper then arose rather *quasi ex contractu* than *quasi ex delicto*, for the action was not penal, and lay against their *hæredes*.

(2) *Partly*. The Lex Æbutia and the two Julian laws allowed the *Legis actiones*, where the suit was before the *centumviri*, and

two Julian laws (1). 2nd. The procedure by *formula*, which was introduced by the laws just mentioned and continued till the time of Diocletian. 3rd. The *extraordinaria judicia* used after the time of that emperor. These three systems, however, did not succeed each other rapidly, but by gradual transitions; and as the influence of the first upon the second is constantly observable, so it would be impossible to explain the *extraordinary* mode of procedure, except by reference to that by *formula* or *ordinaria judicia*.

Q. What common features had the procedure by *legis actio* with that by *formula*?

A. That which distinguishes the *judicia ordinaria* from the *judicia extraordinaria* is this, that the former recognized what we should call *decision by juries*, in other words, the magistrate did not finally decide the matter, but after determining, as the organ of the law, the legal consequences of the facts alleged by the demandant, or by the defendant, and after defining the question, on which the condemnation or the discharge of the defendant should depend (*jus dicere*), he referred the solution of such question, the verification of the contradictory averments of the disputants, to one or more judges, or juries (*judex, arbiter, recuperatores*), who were selected from the citizens, and whose duty it was to pronounce sentence (*judicare*); hence the procedure was divided into two portions, the proceeding before the magistrate (*in jure*), and proceeding before the judge (*in judicio*) (2).

Q. Explain the *legis actiones*.

A. The *legis actiones* were solemn forms of proceeding,

in cases *damni infecti* (vide Gaius, 4, 34). Till the time of the Christian Emperors the *legis actiones* were used in acts of voluntary jurisdiction, such as enfranchisement by the *vindicta, cessio in jure* adoption, emancipation, &c.

(1) The *Lex Ebutia* is earlier than Cicero (A. U. C. 578). The Julian laws date from the reign of Augustus.

(2) This division between the magistrate and the judge or jury is of very ancient date; it is certainly older than the Law of the Twelve Tables, for the *object* of one of the actions sanctioned by that law was the *judicis postulatio* (demand of a *judex*). Whether it was in use under the earlier kings is a moot point. But it is clear that the very earliest ideas we have as to the Roman procedure suppose the existence of this institution. Observe, the magistrate had *jurisdictio*, power to declare the law, and the *imperium* the power of command and constraint,—the right to use the public force to enforce his orders.

consisting of acts and words fixed with such rigorous precision, that the least mistake or alteration in them involved the loss of the suit. There were five: 1. *Sacramentum*; 2. *Judicis postulatio*; 3. *Condictio*; 4. *Manus injectio*; and 5. *Pignoris capio*.

Q. Give some details as to each.

A. 1. As to the *sacramentum*, the thing in dispute was brought before the magistrate (*in jure*); each of the claimants then touched it with a rod (*vindicta, festuca*), which was the *vindicatio*, and said, "*Hunc ego hominem* (in case of a slave), *ex jure quiritium meum esse aio secundum suam causam, sicut dixi. Ecce tibi vindictam imposui.*" At the same time each party seized the Thing in question, which was called *manuum consertio*. If the whole Thing could not be brought into court, a portion of it was, e. g., a turf, twig, &c. After the *consertio* the magistrate said, "*Mittite ambo hominem.*" Next came the wager, or *sacramentum*, by which each party challenged his adversary to deposit a certain sum, which the loser was to forfeit to the treasury of the people (*ærarium*), to be applied to the expense of sacrifices (1). The wager was this:—He who first went through the *vindicatio* asked his adversary why he claimed the thing. *Postulo anne dicas qua ex causa vindicaveris.* The other answered, *Jus peregi sicut vindictam imposui.* The former replied, *Quando tu injuria vindicasti D.L. æris sacramento te provoco*, "I challenge you to a deposit of 500 pounds of brass:" the other accepted, saying, *similiter ego te.*—But afterwards, instead of actually paying the *sacramentum*, the prætor allowed the parties to furnish sureties (*prædes*) in order to secure payment of the *sacramentum* to the public treasury (*prædesque eo nomine prætori dabantur*, Gaius, 4, 13).—The action by *sacramentum* was general, i. e., it was the form adopted when no particular course was pointed out by the law: it was applicable, not only when a real right (*in rem*) was sought to be recovered, but also when the claim arose out of an obligation (*in personam*); though, in each case, the accompanying ceremonies differed (2).—The formalities of the *sacramentum*

(1) The amount of the *sacramentum* was fixed by the Twelve Tables: it was 500 asses when the value in dispute was 1000 asses or more: 50 asses when the value was under that sum, or when it was a question of liberty (Gaius, 4, 14).

(2) In suits as to immoveables, the *vindicatio* was in the form of a feigned duel on the spot, the two parties pretending to fight for the thing in dispute till one of them expelled the other and

being completed, the parties demanded a *judex*, which the magistrate allowed, but not till after a lapse of thirty days. When the question concerned the property in a Thing, the magistrate, before appointing the *judex*, decided whether the plaintiff or the defendant should have provisional possession of the Thing in dispute; this was called *vindicias dicere*, and he to whom possession was granted, was bound to guarantee to the other party the restitution of the Thing and its fruits (*prædes litis et vindiciarum*) if he should succeed—*lis* denoting the Thing, *vindiciæ* the fruits.

2. As to the *judicis postulatio*, all we know is that in this action of law each party addressed the magistrate thus: "*Judicem (arbitremve) postulo uti des.*" Probably it was invented to enable the parties, in certain cases, particularly in enforcing obligations, to demand directly a *judex*, without being required to make any deposit, as in the *sacramentum*.

3. The *condictio*—this action of law, as it was less ancient than the others, so it bore less similarity to the primitive and general form of procedure. Ordinarily the procedure began with the *in jus vocatio*, that is, the demandant summoned the defendant (*adversarius*) by formal words, and if necessary dragged him before the magistrate (B. 3, t. 12). There he solemnly set forth his demand, and completed, as did also the defendant, the forms peculiar either to the *sacramentum*, or, in some few cases, to the simple *judicis postulatio*. The magistrate then adjourned the matter, desiring the parties to appear again before him in thirty days, for the purpose of nominating a *judex*; and the parties mutually bound themselves not to make default on the day fixed (*vadimonium*) (1). Now, in order to avoid the first appearance before the magistrate, and its formalities, the demandant was allowed to inform the defendant out of court as to the nature of his claim, summoning him, at the same time, to appear on the thirtieth day before the magistrate, to receive a *judex* (*actor adversario denunciabat ut ad judicem capiendum die xxx. adesset*, Gaius, 4, 18). This information was no doubt given according to a regular form; and it was probably followed by mutual guarantees,

brought him before the magistrate (*deductio*) The litigant parties then challenged each other, in regular terms, to deposit the *sacramentum*, and the suit pursued its ordinary course.

(1) *Vades* were the persons who presented themselves as security for the due execution of the *vadimonium*.

which the parties exchanged *privatim* that each would present himself *in jus* on the day named. This, in fact, seems to have given rise to that summary form of proceeding called *condictio* (1), which exclusively applied to those personal actions in which the plaintiff maintained that the defendant was bound to give a Thing certain (*quid intendimus dare nobis oportere*, Gaius, 4, 18) (2).

4 and 5. As to the *manus injectio* and the *pignoris capio*, they were modes of execution, the former on the person, the latter on the goods of the debtor. The *manus injectio* was originally used as the ordinary way of having compulsory execution of judgments (*judicati*) (3). But it was extended to various other cases in which the creditor was authorized to act as if he had obtained a judgment (*pro judicato*). Its effect was to reduce the debtor (*adjudicatus*; *addictus*) to a kind of slavery, which continued until the debt was paid (p. 9, 230).—The *pignoris capio* consisted in actual seizure of a Thing belonging to the debtor—a seizure made by private authority, and accompanied with formal words and gestures—and took place only in a few defined cases (4): and the debtor could

(1) *Condicere*, says Festus, is *dicendo denunticare*. *Condicere* also means to agree (D. 18. 1, 66). The term *condictio*, therefore, is derived from this, that the parties agreed, in the absence of the magistrate, to appear before him on the thirtieth day to receive a *judex*.

(2) The *condictio* introduced, subsequently to the Twelve Tables, by the *Lex Silia* (A. U. C. 510), applied only to those actions in which a fixed sum of money (*certa pecunia*) was sued for: it was extended by the *Lex Calpurnia* (A. U. C. 521) to every personal action in which anything certain was claimed (*de omni certa re*, Gaius, 4, 19). *Condictio* was *triticaria* (*triticum*, wheat) when anything certain except money was claimed. In the procedure by formula the name *condictio* continued to be given to that action, the formula of which was couched in the words, "*Si paret dare oportere* ; which were suggested by those used in the old *condictio* (B. 3, t. 14).

(3) In ancient times, and except in those few cases in which the *pignoris capio* was allowed, the creditor had no right of direct execution against the goods. But the debtor was indirectly compelled to sell his goods to avoid the *manus injectio*. It was not till a later period that the prætors introduced the *missio in possessionem bonorum* (B. 3, t. 12).

(4) The privilege of *pignoris capio* attached only to certain claims which were favoured on public grounds. Thus, for the sake of public worship, it was allowed against one who bought a victim but did not pay for it. For the sake of the military service

not recover the Thing so taken as a pledge until he had satisfied the creditor.

Q. Explain the procedure by *formula*, and how it differed from that of the *legis actiones*.

A. The leading characteristic of the procedure by *formula* consisted not simply and solely in sending the matter to a *judex* or jury, for, as we have seen, that was done under the *legis actiones*; but it consisted, 1st, in this, that by the *formula*-system the parties had no formal acts to perform, and no formal words to utter *in jure*; 2nd, in this, that *formulae* or written instructions were drawn up, containing the appointment of the *judex*, fixing the limits of his powers, and defining the questions he had to decide (1).—In fact, under the system introduced by the *lex Æbutia*, the *formula* became the important point in the procedure. For by means of it—by combining and varying with exhaustless ingenuity the terms of this order of reference, the *prætors* and the *jurists* managed to carry into practice the changes and developments which Roman law underwent during the most brilliant period of its history.

Q. Does it not become very important, then, to understand the procedure by *formula*?

A. Yes: this procedure is in truth the key to the Roman law; it is that system of law to which the writings

it was allowed to soldiers against one who, by direction of the tribune of the *ærarium*, was bound to furnish them with pay, or the value of a horse or forage (*as militare, as equestre, as hordearium*). Gaius tells us (IV. § 26 to 29), that it was allowed to the publicans for the purpose of recovering the taxes.

(1) In ancient time, *i. e.*, when the *legis actiones* were in full force, the magistrate did not generally settle in writing the question for the *judex*; but the parties took care to have witnesses, who should inform the *judex* as to the terms and the nature of the question intrusted to him. Now, *litis contestatio* was the appropriate term for the formal vouching of these witnesses at the time when the *judex* was appointed, and when the matter to be investigated by him was settled by the magistrate. *Contestari litem*, says Festus, *dicuntur duo aut plures quod ordinato judicio, utraque pars dicere solet*: TESTES ESTOTE—The custom of calling witnesses was discontinued as useless, when the powers of the *judex* were defined by a written *formula*; but the name *litis contestatio* was still used to denote that stage of the suit at which such vouching formerly took place. Hence the *litis contestatio* took place when the *formula* was delivered containing the result of the discussion (*controversia*) before the magistrate (*in jure*, pp. 320, 365).

of the classical jurists from which the Digest and the Institutes were compiled, refer: and without a knowledge of which it is impossible to understand rightly the texts themselves, especially the doctrines they contain as to *obligationes*, *actiones*, and *exceptiones*.

Q. Explain briefly the course of procedure according to the *formula system*.

A. 1. The proceeding commenced by the *in jus vocatio*, that is, by the summons given by the demandant to the defendant to accompany him to the presence of the magistrate appointed to exercise jurisdiction, *viz.*, the prætor at Rome, the præses in the provinces, and the duumvir in the Italian cities. If the defendant refused, the demandant might then compel him by force; but the rigorous exercise of this right was relaxed either in favour of certain persons whose dignity and consideration seemed to entitle them to be protected from such violence (1), or in favour of certain periods of time (2). But the direct use of violence, though always recognised by the law, became useless after the prætor adopted the plan of a fine and an action *in factum* (3) against a person who had been summoned *in jus* and had refused to attend. But the defendant might relieve himself for the time from attending before the magistrate by giving security (*cautio*) that he would attend on the day fixed (4).—Now in

(1) Neither magistrates in the exercise of their duties, nor priests performing a sacrifice, could be summoned *in jus*. The child who desired to summon his ancestor, the freedman who desired to summon his patron, were each required to obtain the sanction of the prætor; and in case of noncompliance with this rule, each of them was liable to an action *in factum*, the effect of which was to charge the child or the freedman with a fine to the amount of 10,000 sesterces (according to Gaius, 4, 46), or 50 aurei in the time of Ulpian.

(2) As the time of harvest or the vintage.

(3) *I. e.*, an action in which the amount of the defendant's *condemnatio* was made to depend on the proof of a material fact, which in this case was whether the defendant had refused to come *in jus*, and had offered no security (Gaius, iv. 46).

(4) This security or bail was at first a *vindex*, who became himself defendant (B. 3, t. 12); in later times, it was a mere *fidejussor* (surety) who became bound for the defendant's appearance on the day fixed. This kind of *fidejussio* was a *vadimonium* precisely similar to that which was given *in re*, when, upon the first appearance, the parties bound themselves to appear on a day fixed. When the defendant was absent or so carefully concealed that he

summoning an *adversarius* (defendant) *in jus*, the demandant was not bound to inform him of the object of the suit until he was before the magistrate. But the custom of explaining to the defendant the nature and the object of the demand (*litis denuntiatio*), and of mutually undertaking to appear on a day fixed *in jus*, became more and more usual till at last it became universal, and the summons by mere *denuntiatio* (announcement) seems in the time of Marcus Aurelius to have replaced the old *in jus vocatio*.

2. The parties being before the magistrate, the demandant proceeded to explain the object of the suit, and pointed out to the opposite party the particular *formula of action* he intended to bring (*edictio actionis*) (1), and which he prayed the magistrate to allow (*postulatio actionis*). The defendant was not allowed to object to an action being granted on any grounds derived from the truth of the facts alleged, because the question in dispute before the magistrate was not as to whether the allegations of the demandant were true, but simply whether, supposing them to be true, they were of such a character as to involve the condemnation claimed by him. The defendant therefore could only maintain that, in law, the action would not lie. But if it was admitted that the action would lie, or if the prætor held, after discussion, that it would, the defendant might then pray him to insert in the formula the *exceptiones* to which the facts of the case might give rise (t. 13).—The prætor, however, refused the action or the exception proposed if they had no foundation in law (2); nor was there any ground for granting an action when the allegations upon which a legal demand rested were admitted by the de-

could not be summoned, the prætor decreed the *missio in possessionem bonorum* (B. 3, t. 12.)

(1) The formulæ were set out in order of subject, in the prætor's *album*; that is, they were inscribed in black characters on a white ground. The demandant was said *edere actionem*, when he pointed out on the album the one which he wished to make use of: but he might select another, so long as the *litis contestatio* had not taken place. The choice of the *formula* was very important; for by employing one which did not suit the facts of the case: for instance, the *actio venditi*, when the facts did not show a sale, the demandant risked the loss of his claim.

(2) *Law*, either civil or prætorian. It was this prerogative of settling the question of law, and of laying down the law (*jurisdictio*), which gave the prætors the means of modifying and enlarging the law on the various subjects—substantially of creating law.

fendant. Such admission was equivalent to a verdict of the *judex*, and the *prætor* thereupon allowed the same compulsory process as he would have allowed had there been a *judicium* (verdict) pronounced (1).

3. The action being held to lie—the question of law being defined—the only thing which remained to be done was to investigate the allegations of the parties; for this purpose it was necessary to nominate the *judex* or jury (2);

(1) Hence the maxim, *confessor IN JURE pro judicato haberi placet*. If, admitting a debt, the defendant disputed its amount, an *actio confessoria* was granted, requiring the *judex* not to examine into the question as to the existence of an obligation, but simply to estimate the amount of the debt: *judex non rei judicandæ, sed æstimandæ datus*.

(2) It was necessary that the *judex* should be agreed upon by the parties, and they might either select one themselves (*judicem sumere*), or reject the person proposed by the magistrate (*judicem recusare, rejicere*). When the parties could not agree as to the *judex*, he was appointed by lot. But in all cases it was the magistrate who invested the *judex*, whether appointed by consent of the parties or by lot, with the authority to act as judge (*judicem addicere*).—Moreover, the *judex* was not selected from the whole body of citizens indiscriminately, but from certain lists which bore some resemblance to our jury lists. Till towards the close of the Republic senators were the only class entitled to appear on these lists, which were prepared every year by the city *prætor*. In A. U. C. 681, the *lex Sempronia* transferred the *judicia* from the senate to the knights (*equites*); and during the remainder of the seventh century the right of being on the list of *judices* was a matter in dispute between the two orders, and was successively transferred from one to the other. A. U. C. 684, the *lex Aurelia* established three decuries of *judices*, composed—the first of senators, the second of knights, the third of the tribunes of the *ærarium*. Augustus added a fourth decury, *ex inferiori censu*—that is to say, composed of citizens who were only rated at a small sum (*census*), and to whom was intrusted the decision of less important matters (*levioribus summis*). Caligula raised the number of decuries to five. This was the latest law until the abolition of the *ordo judiciorum*.—The annual lists of the *judices selecti* contained at first only 300 names; afterwards they were much increased. *Cicero ad Att. VIII.* 16, reckons the *judices* at 850 in number; and Pliny, *Hist. Nat.* 33, 7, tells us that in his time the lists contained 4000 names.—The *judex* taken from the decurial lists was the *judex*, properly speaking, who was called *arbitrator* in certain cases—viz., in actions of *bona fides*—a name derived from the peculiar extent of his duties in actions of that sort. But sometimes the *prætor* remitted the matter, not to a single *judex*,

hence the *formula* drawn up by the magistrate, which nominated the *judex*, determined the points to be proved before him, and defined the extent of his authority (1). At this stage the phrase was, *judicium constitutum, acceptum; lis inchoata; lis contestata* (2).

but to several *judices*, called *recuperatores*. These were not of necessity chosen from the lists of *judices* proper. The magistrate named the first persons whom he could find to fulfil the duties: "*Nam ut in recuperatoriis judiciis*," says Plin. Epist. III. 20, "*sic nos in his comitiis, quasi repente apprehensi sinceri judices futimus*." This circumstance, together with some other facts, has given rise to the conjecture that the *recuperatores* were principally employed to decide urgent matters, especially claims as to possession. Their name seems to show that it was part of their duty not merely to decide the dispute, but also to see the decision carried into effect, by putting the complainant again into possession of what had been forcibly taken from him. To complete this view of the judicial organization of the Romans, we may add that, besides these judges or juries (*judex, arbiter, recuperatores*) specially named for each business, there was a permanent tribunal, viz., the *centumvirs*, composed of something more than 100 members, who were elected probably by the tribes and divided into four sections or councils. Some kinds of business were transacted by two of the councils, some by the four. The *prætor* referred to the *centumvirs* certain causes—questions of property and *hæreditas*, and some questions of *status*, which required to be determined *ex jure quiritium*. No *formula* was drawn up for them, for they were judges of law as well as fact, and the proceedings before them were according to the old form of *sacramentum*.

(1) The following is the formula, according to Gaius, iv. 40—43:—"N. . . . *judex esto. Quod Aulus Agerius Numerio Negidio hominem vendidit, si paret Numerium Negidium Aulo Agerio sestertium X millia dare oportere, judex Numerium Negidium Aulo Agerio sestertium X millia condemna: si non paret, absolve.*" "Let N. . . . be the judge. Whereas Aulus Agerius has sold a slave to Numerius Negidius, if it appears that N. N. ought to give A. A. ten thousand sesterces, condemn N. N., *judex*, to pay the ten thousand to A. A.: if it does not so appear, acquit him."

(2) One of the effects of the *litis contestatio* was to produce a *novatio* in the rights of the parties to the suit, by substituting for the original liability (*obligatio*) a liability to submit to the *judicium*, and to obey the decision of the *judex*. But this *novatio* did not arise *ipso jure*, except when the action brought was—1. *personal*; 2. *in jus*; 3. a *judicium legitimum*. For as to 1. the obligation, raised by the *litis contestatio*, was personal,

4. The formula being delivered, the parties had to go before the *judex*; and, except in some special cases, where time was allowed by the prætor to obtain proofs, or for some other reason, they adjourned till the third day (*comperendinatio, die comperendinalis*). It does not appear whether any securities were given by the parties for their appearance then (1): but there were certain definite cases in which security (*cautio*) was required to insure the fulfilment of the *judicatum*; and, no doubt, such security included the obligation to appear *in judicio* (t. 11, *post*).

5. Before the *judex* the case was shortly explained: and this was called *causæ coniectio*, or *causæ collectio*: a sort of statement of the leading points. Then came the production of proofs (2) and the pleadings (*causæ peroratio*) (3). Sometimes the *judex* gave interlocutory or preparatory judgments (*interlocutiones, jussus, mandata*). The final judgment was called *sententia*.

6. Judgment (4) being pronounced, the duty of the

and so could be substituted only for a personal obligatio; as to 2. it is clear that an obligatio can never be substituted for a *fact*, though of course one obligatio may replace another by *novatio*: hence if the action was to decide a fact (*in factum*), and not a right (*in jus*) there could be no obligatio upon which that raised by the *l. contestatio* could operate: as to 3. the action must not be *imperio continens, i. e.*, binding only during the term of the judge's power (p. 369), but *legitimum, i. e.*, binding absolutely. It is obvious why an *obligatio* binding for a time should not extinguish one binding for ever (p. 316).

(1) None of the parties had any interest in failing to appear before the *judex*: the demandant, of course, had none: and, as to the defendant, his presence was not required in order to the *judex* pronouncing sentence. For if the defendant did not appear he was cited once or oftener, according to certain forms, before the *judex* pronounced judgment; but after these formalities the judgment had the same effect as if it had been obtained after a hearing.

(2) The means of proof were *witnesses, written documents, oaths, and admissions*. *Torture* was sometimes used against slaves; *e. g.*, when the question concerned the goods forming part of a successio.

(3) The *judex* was often assisted by persons called counsellors, whose knowledge might inspire him with confidence. Cicero, addressing them, says: "*Vosque qui in concilio adestis.*" (Pro. Quint.)

(4) The judgment was pronounced aloud to the audience (*pronuntiare*). But it might be written beforehand (*ex tabella pronuntiare*). In course of time the drawing it up in writing became compulsory (*ex periculo recitare*).

judex ceased (*judex qui semel sententiam dicit, judex esse desinit*, D. 42, t. 1. 14, 55). For the execution of the judgment it was necessary again to come before the magistrate, whether the object was to proceed by *manus injectio*, or for the *missio in possessionem* of the goods of the defendant (B. 3, t. 12).

Q. What were the chief parts of the formula?

A. There were four, besides the nomination of the judex, viz.: the *demonstratio*, the *intentio*, the *condemnatio*, and the *adjudicatio* (1).

The *demonstratio* is that part of a formula which points out the fact raising the action; e. g., *Quod Aulus Agerius Numerio Negidium hominem vindidit—Quod A. Agerius apud N. Negidium mensam argenteam deposuit*.

The *intentio* is that part of the formula which states the claim of the demandant, the matter upon which the judex will have to see whether it is well or ill founded; e. g., *Si paret N. Negidium A. Agerio sestertium decem millia dare oportere—Quicquid paret N. Numerium A. Agerio dare facere oportere—Si paret hominem ex jure Quiritium A. Agerii esse* (2).

The *condemnatio* is that part of the formula which gives the judex authority to condemn or acquit the defendant; e. g., *Judex N. Negidium A. Agerio sestertium decem millia condemna si non paret, absolve—Quicquid ob eam rem N. Negidium A. Agerio dare facere oportet ex bonâ fide ejus id judex N. Negidium A. Agerio condemnato: si non paret absolvito—Quanti ea res erit tantam pecuniam, Judex N. Negidium A. Agerio condemnato: si non paret absolvito* (3).

The *adjudicatio* is that part of the formula which gives

(1) Besides these *principal* parts, so called because they were essential to every claim, there were several *accessory* or additional parts which sometimes formed part of a formula; e. g., *exceptiones*, *replicationes*, *duplicaciones* (t. 13 and 14, *post*), and *præscriptiones*, of which we have said something (p. 97).

(2) The *intentio* is the essence of the formula. There can be no formula without one, whereas the other parts are not essential to it. It is chiefly a difference in the *intentio*, which gives rise to the various divisions of actions, to be explained presently, especially the division into those *in rem* and *in personam*, and into those *in jus* and *in factum*.

(3) It appears, from these formulæ, that in some actions the sum to be awarded against the defendant (*condemnatio*) was fixed for the judex, in case the question proposed in the *intentio* was given against such defendant (*sestertium decem millia condemna*); the condem-

the *iudex* authority to give judgment, i. e., to transfer the property in the subject-matter of the suit to the party who, in his opinion, ought to have it. The *adjudicatio* does not occur except in the actions *familiæ erciscundæ* (for partitioning a *hereditas*), *communi dividundo* (for dividing a Thing held in joint property), and *finium regundorum* (for the settlement of boundaries); the following is the form: *Quantum adjudicari oportet iudex Titio adjudicato* (1).

natio was then *certain pecuniæ*. The *condemnatio incertæ pecuniæ* was sometimes *cum taxatione*, when a maximum was fixed for the *iudex*, which he would exceed at his peril (*iudex duntaxat decem milia condemna*); sometimes it was *infinita*, when unlimited power was left to the *iudex* to fix the *condemnatio* (*quantum ea res erit—quicquid ob eam rem*).—The decision, moreover, of the *iudex* was always required to be a fixed sum, even when the *condemnatio* in the formula did not state a sum certain (Gaius, 4, 52).—And here we may observe, that the *condemnatio* was always pecuniary; so that, in claiming even a certain *corpus*, as this or that piece of land, this or that slave, the *iudex* had no power to condemn the defendant to give or restore the Thing in specie, *non ipsam rem condemnat* (Gaius, 4, 48); but he was required to value in money the subject-matter in dispute, and to condemn the defendant in the amount of such valuation (*sed æstimata re pecuniam eum condemnat*). It seems to have been otherwise in the time of the *legis actiones*, and that then the *condemnatio* might have constituted a direct means of recovering the thing claimed in specie (*sicut olim fieri solebat*, Gaius, *Ibid*). This rule, by which the *condemnatio* was always required to be pecuniary in its character, did not, however, involve the inconvenient consequences which might be anticipated; because the harsh method of execution, affecting all the goods and even the person of the *damnatus*, often determined the wrongful holder, who had lost or was about to lose his suit, to restore the Thing sued for. In fact, we shall find that in case of *actiones arbitrariæ*, among which we include *vindicatio* and the *actio ad exhibendum*, the *iudex* had the power, by a clause modifying the *condemnatio*, to suspend its effect against the defendant in case he obeyed the order of the *iudex* to restore the article in dispute. And as the *iudex* might increase the pecuniary *condemnatio* to any extent (*sine ulla taxatione, in infinitum*) in case the defendant did not comply with such order (*jussus arbitrium*), it was the defendant's interest to obey.—Moreover, it appears probable that in the time of Ulpian, at all events, these principles had been modified, and that the defendant who refused to obey the *jussus* of the *iudex*, might be compelled to obey the *iudex manu militari*.

(1) The *adjudicatio* gives these three actions a special character; hence their name, *mixtæ*.

Q. Did these four parts necessarily occur together in every formula?

A. No: they were to be found together only in the three actions for partition; for, as we have just said, it was only in these that *adjudicatio* occurred.

In most cases the formula contained the *demonstratio*, the *intentio*, and the *condemnatio*.

In some cases the formula contained nothing but the *intentio*; it was then called a *præjudicium* or *actio præjudicialis*. The duty of the *judex* was then confined to that of determining the question stated in the *intentio*, without pronouncing either a *condemnatio* or *adjudicatio* (1).

In very many actions the formula contained nothing but the *intentio* and *condemnatio*. This was the case in the *actio in rem*; and even in the *actio in personam*, where it was brought for a thing, or, at all events, a sum certain (*certa pecunia*) (2): so it was in actions *in factum* (3).

Q. Explain the origin and nature of the difference between actions *in jus* and *in factum*.

A. This difference concerns the mode in which the *intentio* of the formula is framed: for the *intentio* sometimes proposes a question of law for solution; implying that it is not enough for the *judex* to see that certain material facts are proved, but that he must consider the legal consequences of such facts, in order to come to a conclusion as to whether they are such as to raise an obligation, or a right in favour of the demandant (*si paret dare oportere*); in this case, then, the action is *in jus concepta*. At other times the *intentio*, in which the *demonstratio* is involved, contains, so far at least as the language goes, nothing but a mere fact to be proved (*Si paret A. Agerium apud N. Negidium mensam argenteam deposuisse, eam que dolo malo N. Negidio A. Agerio redditam non*

(1) The form of *præjudicium* was used when it was necessary to determine preliminary questions, or even principal questions, wherein the consequences involved formed no part of the suit. The *actio præjudicialis* lay as to questions of right, of *status* (whether such a one was free, a freed man, a filius-f., &c.); and as to mere questions of fact, as the amount of a *dos* (dowry) or a security (Gaius 3, § 123; 4 § 44).

(2) For the formula *si paret dare oportere* does not necessarily require that the ground of the obligation—the *fact* raising it—should be pointed out.

(3) In the *actio in factum* the fact, in place of forming part of the *demonstratio*, becomes part of the *intentio*, so that it is made part of the question.

esse, Gaius 4, 47), and in this case the action is *in factum concepta* (1).

Q. In the formula procedure were not the words *formula*, *actio*, and *judicium* synonymous?

A. Yes: the *formula* given by the prætor was the authority to the *judex* (*judicium*), and gave the demandant the right to sue before such *judex* for condemnatio against the defendant (*actionem*). Taking the effect for the cause, the words *judicium* and *actio* became synonymous with *formula* (2).

Q. How was the proceeding by formula abolished?

A. Even during the existence of the formula-system there were certain cases, *e. g.*, *fideicommissa*, in which the magistrate, instead of sending the matter to a *judex*, himself determined it. This was called a *judicium extraordinarium*, *extra ordinem cognoscebat*; but the number of such cases increased, and it became more and more common to have matters determined finally in the *officium* of the imperial magistrate without a *judex*. This exception Diocletian converted into a general rule. Thenceforth all judgments became extraordinary (*extra ordinem jus dicitur qualia sunt hodie omnia judicia* (§ 8, t. 16) (3).

Q. Such being the general idea of the judicial organization of Rome, what is an *Actio*?

Pr. A. The Institutes define it as the right to sue before a *judex* for that which is due, *jus perseguendi in judicio quod sibi debetur*; but this definition, borrowed from the jurist Celsus, is not correct, except with respect to the for-

(1) Actions *in factum* originated with the prætors, who made the liability of a man depend on any fact they pleased; thus they created new rights or sanctioned those not recognised by the civil law, or allowed persons to be parties in suits who were incapable by the civil law; *e. g.*, *fili-f.*: who, before the introduction of the *peculium castrense*, and even after that, as to anything not immediately connected therewith, could bring no *actio in jus concepta*, because by the civil law they could not claim personally to be either proprietors or creditors (Gaius II. 96).

(2) In his edict the prætor used the expressions *actionem* or *judicium*, *dabo* indifferently. In *arbitrary* actions the *actio* was sometimes called *arbitrium*, as in the expression *arbitrium tutela*.

(3) The superior magistrates, in case of necessity, could always send parties before the *judices pedanei*; but this was done without any formula. These *judices* were not juries, but inferior magistrates, who determined both the law and the fact.

mula-system, by which no one could bring an *actio in judicio* without having obtained the right to do so, *i. e.*, without a *formula*; but even under the formula-system this definition seems applicable only to a personal action. During the latest period of the law an action would be more properly defined: the right to sue at law for that which is due or belongs to a man (1).

DIVISIONS OF ACTIONS.

FIRST DIVISION.—Q. What is the leading division, *summa divisio*, of actions?

A. They are divided into real actions (*in rem*) and personal actions (*in personam*) (2).

(1) The term *actio* had various significations, which may be summed up thus: 1. Under the earliest system, *legis actio* is the formal procedure by which the law is set in motion to enforce a right. 2. Under the formula or *ordinary* system *actio* signifies: (a) the right allowed by the magistrate (having *jurisdictio* and *imperium*) to sue for that which is due; (b) the *formula* defining this right; (c) the suit before the *judex* appointed by the formula (*judicium*). 3. Under the *extraordinary* system *actio* signifies: (a) the right derived directly from the law; (b) the act of suing; (c) the mode of suing.

(2) The text (§ 1), says expressly, *OMNIUM actionum summa divisio IN DUO GENERA deducitur*. And yet in § 20 we find, *Quædam actiones mixtam causam obtinere videntur, tam in rem quam in personam*. Hence we sometimes find it said that there is a third class called *mixed*, *i. e.*, both *real* and *personal*; but we shall see that the action is *personal* when the demandant insists that the defendant is bound to him, and that it is so called because the defendant is of necessity named in the *intentio*. Whereas the action is *real* when the demandant sues without averring any obligation, and when the defendant is not named in the *intentio*. Hence it is clear that an action cannot be both *real* and *personal*, for it is impossible in the same action to aver and not to aver an obligation—to name and not to name the defendant. It would seem, therefore, that when actions are regarded as *mixed* they are not regarded in the same point of view as when they are regarded as *real* and *personal*; the distinction is on a different principle. For it is the *intentio* which determines whether an action is *real* or *personal*; but it is the effect produced by the exercise of that double

Q. What is a personal action?

§ 1. *A.* It is an action in which the demandant maintains that the other party is bound to him by a personal obligation (*per quas intendit adversarium ei dare aut facere oportere et aliis quibusdam modis*) (1).

Q. What is a real action?

§ 1. *A.* An action in which a man sues another without averring any obligation on his part (*cum eo agit, qui nullo jure obligatus est*); *e. g.*, where the demandant claims the property of a Thing as his own (*si Titius suam esse intendit, in rem actio est*) (2).

authority which the *judex* has, either to adjudge the thing or to condemn the person, that determines whether the action is *mixed*; and hence in the three mixed actions (t. 17) the formula contains both an *adjudicatio* and a *condemnatio*.

(1) *Et aliis quibusdam modis* alludes to the personal actions whose *intentio*, according to the formula-system, was different from *condictio* (whereof the formula was *Si paret dare oportere, or quicquid paret dare facere oportere*), *e. g.*, actions *in factum conceptæ*, in which the formula, though apparently proposing a question of fact, in substance required the *judex* to determine whether the defendant was bound.

(2) To understand this we must remember (p. 232) that there are certain rights which are *absolute*, affecting all, *jura in re*, and certain others which are *relative*, affecting certain persons, *jura ad rem*. Now a real action is one in which a man asserts his claim to *jus in re* against every individual who disputes that right: an action in which a man requires to be acknowledged as *proprietor*, *usufructuary* or *free man*. A personal action is one in which a man asserts his claim to something quite personal as between him and the party sued, in which the plaintiff insists that this *particular man* is bound to him.—Observe, that though an *obligatio* about to be enforced against the defendant may imply a *jus in re* in the person of the demandant; still, if this *jus* is not disputed by the opposite party, if the question arises merely as to the *obligatio*, and nothing more, the action is personal. Thus, where a man sues another who has been guilty of waste (*devastatio*), if the proprietorship of the thing wasted is not disputed the action will be personal; but recourse must be had to a real action if the defendant claim to be himself the proprietor of the thing.—Care must be taken not to confound actions for *moveables* (transitory) and actions for *immoveables* (local) with actions *real* and *personal*. The former of these distinctions applies when the question is, whether the object of the action be to claim a *moveable* or an *immoveable* thing; either on the ground that the property is ours, or on the ground that we are entitled to have the property transferred to us. But actions are

Q. Whence the names *actio in rem* and *in personam*?

A. These names are usually derived from the fact that the real action attaches to the Thing, and may be brought against its possessor, whoever he may be; whereas the personal action attaches to the person of the debtor, and can be brought against him alone. But this statement is too vague; for there are some personal actions, *e. g.*, the *actio ad exhibendum*, which may be brought against the possessor, simply because he is the possessor (D. 10, t. 4, L. 3, § 13), and which in this respect resembles a *real action* (1).—The meaning of the words *in rem* and *in personam*, as applied to actions, must be determined by that which these words bear when applied to the edicts of the prætor, to pacts, and to exceptions. In all these cases *in rem* denotes a declaration framed in general terms, in which no particular individual is pointed out; *in personam* denotes a declaration in which reference is made to a definite individual (2). In short, there are some claims which may be made without naming the other party; as, when I maintain that I am the proprietor of such a piece of ground, or that I have a right of usufruct or of servitude over such a piece of ground: there are, on the contrary, other claims, which cannot be stated without naming the other party, which is the case in *obligationes*; for it is not sufficient for me to show generally that I am a creditor: it

real or personal, not because of the nature of the Thing to be recovered, but because of the character of the *intentio*; for the action is *real* if by the *intentio* the demandant claims a right *in re*: it is *personal* if he claims an *obligatio* in his favour.

(1) Almost the same may be said of the *actio noxalis*, which lies against every proprietor of a slave who has committed damage (*post*, t. 8). On the other hand, there are some real actions which do not lie against every holder; for instance, the *actio Pauliana* (of which presently) does not lie against a purchaser for valuable consideration, unless he has acted *mala fide*, though it does lie against a purchaser *mala fide*, even though he is no longer in possession.

(2) Thus, Ulpian says, that the rule laid down in an edict is *in rem*, when it is general and points out no specific person, *generaliter et in rem loquitur, nec adjicit, a quo gestum est*. So an instrument is *in personam* when its operation will benefit only one individual, and not his *heredes*; it is *in rem* when framed in such general terms as to be capable of being called in aid even by other persons than those who have concurred in it (L. 7, § 8; L. 13, § 5; D. 2, t. 14).

must be further shown that the defendant is my debtor. The action is therefore *in rem* when the right asserted by the demandant is stated in general terms without the name of any defendant being given, (e. g., *si paret fundum capentem ex jure Quiritium Titii esse*); it is *in personam* when the defendant is individually pointed out (e. g., *si paret Numerium Negidium Aulo Agerio sestertium decem millia dare oportere*).

Q. But it seems impossible to avoid naming in the formula all the parties to the suit: and it is laid down (D. 6, t. 1, § 27) that a real action can only lie against him who has been named defendant by the prætor (*in jure*): so that if the thing whereof the property is claimed happen to change hands, a fresh action must be begun before *condemnatio* can be awarded against the new possessor.

A. True: but what we have said applies not to every part of the formula, but merely to the *intentio*; to it alone we refer when we say that the action is framed (*concepta*) *in rem* or *in personam* (1). And the reason why the *intentio*, in a real action, points out no individual, is because it would be useless to do so; for it is enough for me if I show that I have an absolute right, e. g., that I am *proprietor* of the thing claimed, to enable me to succeed against any defendant whatever; whereas it can be of no use for me to show that an *obligatio* (liability) has been incurred in my favour, if at the same time I do not show that the individual liable is the individual sued.

Q. Have *real* and *personal* actions any other name?

§ 15. A. *Real* actions are called *vindicationes* or petitions (*petitiones*); and the name *condictiones* is given, if not to all personal actions, at least to all those in which the demandant maintains that the opposite party is bound to give or do something (2).

Q. Whence the name *condictio*?

A. It is derived from the old *legis actio*, called *condictio*,

(1) In the real, as well as the personal action, the defendant is of necessity named in the *condemnatio*.

(2) *Conditiones* were actions in which the form of the *intentio* was this: *Si paret dare oportere—si paret dare facere oportere*. But personal actions, in which the *intentio* was differently framed; e. g., actions *in factum*, the action of theft (the *intentio* of which was this: *Si paret damnum decidere oportere* Gains, 4, 37), were not included among *condictiones*.

which was used for the special purpose of claiming the execution or fulfilment of a liability (*obligatio*) to give something. Under the formula-system the name *condictio* denoted that action whose *intentio*, using the same terms as the old *condictio*, alleged, however indirectly, that the demandant claimed under an *obligatio* incurred by the defendant to give or to do something (*si paret . . . dare . . . si paret dare facere oportere*). Hence the two *condictiones*: one *certi* when the *intentio* was *dare*, to give a thing definite; the other *incerti* when the *intentio* was *quicquid dare facere*, "to give or to do whatever is proper" (p. 287).

Q. Are real actions, or *vindicationes*, applicable only to Things corporeal?

§ 2. A. No: they apply also to Things incorporeal. By means of a real action a man may claim the rights of usufruct, of *usus*, and prædial servitudes.

Q. How do you divide real actions with reference to servitudes, personal or real?

§ 2. A. They are either *confessoria* or *negatoria*. The *actio confessoria*, or affirmative, is one in which a man claims to have a servitude over a corporeal hereditament: as when he claims a usufruct in the land, a right of passage, or of view, &c. The *actio negatoria*, or negative, is one in which a landlord contends that the individual who claims to have a right of passage or usufruct over his land has no such right (1).

Q. Is there not something peculiar in the *actio negatoria*?

§ 2. A. Yes: in it the proof lies on the defendant, who thus occupies the position of plaintiff, *partes actoris sustinet*; whereas generally it is for the demandant to prove his case, for usually he affirms. But in this case he denies, and it is the defendant who insists that he is entitled

(1) Ortolan II. 530, after observing that servitudes are fragments of property (p. 82), so that property in the same thing may belong to different persons, says: "Hence two cases—either I may claim to have a servitude over that thing of which another is possessor, in which case my claim is this: *Si paret jus utendi fruendi mihi esse*; or, being myself possessor and proprietor of a thing, another may exercise over it some right of servitude, and I may wish to put a stop to such unfounded claim, in which case my claim is this: *Si paret jus utendi fruendi adversario non esse*. In the former case the *actio* is *confessoria*, in the latter *negatoria*."

to the *servitude*. Therefore it is for him to prove his case (1).

Q. In suits as to Things corporeal, is there any action *negatoria* as in suits for *servitudes*?

§ 2. A. No: it is idle for me to prove that A. B. is not proprietor of a Thing, since it would not therefore follow that I am the proprietor thereof. In short, as to a party in possession, the right to claim property (*vindicatio*) is not open to him; for he has no claim to make, and if he is assailed, he has nothing to prove (2): as to the party not in possession, his action is of necessity affirmative or *confessoria* in form; for he must prove his right (3).

SECOND DIVISION.—Q. How are actions divided in regard to their origin.

§ 3. A. Into *civil* and *prætorian*. *Civil* actions are those derived from the civil law (*ex legitimis et civilibus causis*); *prætorian* actions are those created by the prætors, and forming part of the *Jus honorarium*: both classes are divided into *real* and *personal*.

Q. Mention the principal real prætorian actions.

§ 3. A. Justinian mentions five: the *actio publiciana*, the *actio quasi-publiciana* (§ 5), the *actio pauliana*, the *actio serviana*, and the *actio quasi-serviana*, or *hypothecaria*.

Q. In what case did the *actio publiciana* arise?

§ 4. A. Suppose a Thing delivered for a good cause (*ex justa causa*), i. e. with an intention to transfer the property

(1) When the demandant has proved the ground of his claim—when, for instance, he has proved the *obligatio*—it is for the defendant who pleads an *exceptio*, i. e., who, not satisfied with denying the demandant's allegation, asserts a fact—to prove it; for instance, that he has paid, or that the demandant is acting *malâ fide*. In the *exceptio*, therefore, the defendant does what the demandant is bound to do in case of the *intentio*. Hence the maxim: *Reus in exceptione actor est*.

(2) A possessor, in order to sustain his possession, had more-over the *interdictum uti possidetis* or *utrubi*, which will be discussed t. 15, *post*.

(3) There is, however, one case, says the text (§ 2), in which the possessor is bound to prove his right of property (*sane uno casu, qui possidet, nihilominus is actoris partes obtinet*): this passage has given rise to much discussion. But it may be a mere summary of what precedes: "There is one case of a possessor being plaintiff, viz., the possessor of an incorporeal thing."

therein (as in case of a sale, or a legacy, &c.) to one who, not having become *quiritarian* owner, lost possession of the Thing, before having acquired title by *usucapio* (1). Now, although such transferee could have no right to claim the property by *vindicatio*, (for that belongs to the *quiritarian* owner alone,) still the prætor allowed him an action, in which the *condemnatio* of the defendant was made to depend, not on the actual right of property in the demandant, but on such right of property as he would have had if the time of *usucapio* had elapsed; which action so granted by the prætor had substantially the same effect as an ordinary *vindicatio* claiming the property. Such was the effect of the *actio* called *publiciana*, after the prætor *Publicius*, who introduced it in order to mitigate the rigour of the civil law (p. 79) (2).

Q. Was the *actio publiciana* of any use to the proprietor himself?

A. Yes: it relieved him from proving that he was owner *ex jure quiritium*, i. e., absolute legal owner: often a difficult matter; for, in order to do so, it was necessary to show that the Thing had been transmitted *à domino*, by ascending from delivery to delivery to the original owner; whereas in the *actio publiciana* it was enough to show that the thing had come into your possession *bond fide*.

(1) Observe, the *delivery* of things *mancipi* did not transfer the property *ex jure quiritium*, even though the delivery was made by the true proprietor (pp. 96, 77); and that the delivery of things *neque mancipi* made *à non domino* did not transfer the property in them, but laid the foundation for *usucapio*.

(2) Gaius (4, § 36) gives the formula of this action *judeex esto, Si quem hominem Aulus Agerius emit quique ei traditus est anno possidisset, tum si eum hominem de quo agitur ejus ex jure Quiritium esse oporteret*, &c. From which it appears that the *actio publiciana* was of no avail unless the plaintiff was in such a position as to acquire title by *usucapio*, and failed to do so only because of too short a time having elapsed. Thus the thing claimed must have been received *bond fide*, and must not be *res vitiosa*, e. g., stolen (p. 98). If the possessor of the article, against whom the *actio publiciana* was brought, was himself *bond fide* possessor and in a position to acquire title by *usucapio*, he could effectually defend himself by an *exceptio* founded on the maxim *in pari causa, melior est causa possidentis*. If the possessor insisted that he was the real proprietor of the Thing claimed by the *actio publiciana* he might defend himself by the *exceptio justi dominii*, and if he proved to be the real proprietor, he gained the suit, and kept possession.

Q. In what circumstances was the action *quasi-publiciana* allowed?

§ 5. A. The *actio publiciana* assumed that a party had acquired title by *usucapio*, when in fact he had not; here, on the contrary, it was assumed that the possessor had not acquired title by *usucapio*, though in fact he had: and this assumption was made: 1st. When a party being absent (1), or in the power of the enemy (against whom, therefore, no action could be brought), acquired title by *usucapio* (2) to the property of a person who was present. 2nd. When title by *usucapio* had been acquired as against, and during the absence of, a man who was absent for good reason.

In both cases the prætor mitigated the rigour of the strict law, which would have deprived the proprietor of that which he had no opportunity of defending, by granting him a real action, whereby he might reclaim the property, just as if there had been no prescription (*rescissa usucapione*), and as if, therefore, he had continued in possession of the property. This action, which was called the action *contrary to the publician* or *quasi-publiciana* (3), could be brought only during one *utilis annus* (p. 224), after the return of the absent party (4).

Q. Did not Justinian introduce some change as to this action?

A. He allowed the *usucapio*, or prescription, to be interrupted by the effect of a petition to the magistrate (C. vii. 40, 2). So that this action was no longer required to prevent an absent party from acquiring by *usucapio*. Moreover, he extended to four years the time during which the action might be brought.

(1) Whatever might be the reason; for it was not only when the absent party was fulfilling a public office (*reipublica causa*) that such action lay.

(2) A man might possess, and therefore acquire title by *usucapio* through another (B. 2, t. 9). When the absent party was in the power of the enemy we must suppose that his slave, or his *filius-familias*, acquired *ex causa peculii* the property of another, for the prisoner could not in any other way have a possession even through his own *filius-familias*, or his own slave.

(3) Or *rescissoria*, for the *usucapio* was rescinded.

(4) The action *quasi-publiciana* was for one year, for it curtailed the operation of *usucapio*, according to the civil law, whereas the *actio publiciana* was *perpetual*, for it enlarged the effects of the civil law (p. 365).

Q. Explain the actio *Pauliana*.

§ 6. A. This action was allowed to creditors, for the purpose of claiming back property which the debtor had alienated in fraud of his creditor's rights (1), as though such property had never ceased to belong to the debtor. This action rested upon a fiction: for the prætor assumed that the Things in question never had been delivered, and that, therefore, they had always continued amongst the goods of the debtor, into possession of which the creditors had been put (p. 229). The actio *Pauliana* was open only for a year.

Q. Against whom does this action lie?

A. Against every purchaser by a title importing clear gain (*lucrativa*); but it does not lie against the purchaser for valuable consideration, except so far as he has been mixed up in the fraud (2).

Q. Explain the actio *Serviana*.

§ 7. A. This is an action introduced by the prætor *Servius*, and allowed to the proprietor of a *prædium rusticum*, by virtue of which he may sue any one holding possession of those Things which the farmer (*colonus*) has made chargeable for his rent (*quæ pignoris jure tenentur*) (3).

(1) In *fraud*, i. e., in prejudice of the creditors, and with an intention to injure them (*vide* p. 17).

(2) It is a great question whether the actio *Pauliana* is real or personal. The truth probably is, that the creditors might bring either a real or a personal action; for just as a man had either a personal action *quod metus causa*, or a real action to claim back that which he had alienated from fear; or, as a minor under twenty-five, injured by an alienation, had either a personal action against the purchaser, or a real action, *rescissa alienatione*; so the creditors were allowed either a personal or a real action, according to the question submitted to the *judex*; for if the formula was thus—*If it appears that A. B. is bound to give the land which he has bought by fraud, &c.*—the action was personal. But if, as the text presumes, the prætor directed the *judex* to inquire whether the land does not belong to the debtor, the delivery being assumed to be null (*rescissa traditione*), the action would clearly be *real*, for this question regards a *jus in re*.

(3) In case of a *prædium rusticum*, only things by express agreement made liable to the payment of rent constitute the pledge (*pignus*) to the proprietor: the fruits, however, of the land are tacitly included in such pledge (*pignus*). But in case of a hired house everything brought into it is considered tacitly charged

Q. Explain the *actio quasi Serviana* or *hypothecaria*.

§ 7. A. It is an action framed in imitation of the action *Serviana*, by which the creditor claims from the possessor that which has been mortgaged to such creditor as a *pignus* or *hypotheca* (1).

Q. What difference is there between a *pignus* and a *hypotheca*?

§ 7. A. A *pignus* (proper) is that which a debtor delivers over to his creditor as a security: *hypotheca* is that which is charged as a security for the benefit of the creditor, but is not delivered over to him (*sine traditione*). The *hypotheca* is created by a mere agreement recognised by the prætor (p. 270). The *pignus* is usually a moveable (*maxime sit mobilis*), but it may be an immoveable. So also one may hypothecate either a moveable or an immoveable.

Q. Suppose a thing hypothecated to several creditors one after the other, by different agreements, which of the creditors had priority?

A. He whose *hypotheca* was earliest in date, according to the maxim *prior tempore potior jure*. So that if the action *quasi Serviana* were brought by one creditor whose *hypotheca* was later in date against another whose *hypotheca* was earlier, the latter had an *exceptio* in bar of the action of the former.

Q. Name the personal prætorian actions.

§ 8. A. They were very numerous (*et alias complures*); the text instances the actions *constitutæ pecuniæ*, *de peculio*, *ex jurejurando*.

Q. Explain the *actio pecuniæ constitutæ*.

A. It is an action created by the prætor, for the purpose of obtaining the fulfilment of a *constitutum*. Now *constitutum* signifies a prætorian *pactum* (p. 270), whereby a

as security for the rent. The action *Serviana* only applies to the case of *prædia rustica*; but the landlord of a house may claim an action *quasi Serviana*.

(1) This action is real; for the question is, whether the thing belonged to the debtor when it was given as a *pignus* or *hypotheca*; for if that was not so, the creditor could have no right *in re* (p. 245). Observe, the creditor was not bound to prove that the thing was *in dominio*, but merely *in bonis* of his debtor, i. e., that such debtor was possessor for a good cause and *bond fide*, for such possession had, in the eyes of the prætor, all the effects of property.

man makes a fresh promise in regard to something *already* due by himself or by another, either by virtue of the civil or natural law (1). The promise creating the *constitutum* we must presume to be a *nudum pactum* (*nulla stipulatione*); for if the promise were by a *stipulatio*, it would raise the civil action incident to a *stipulatio* (B. 3, t. 15).

Q. What Things may one *constituere*? In other words, for what Things may the action *constitutæ pecuniæ* be brought?

A. Formerly this action was available for such things only as might be the subject-matter of a *mutuum*, i. e. for things valued in number, weight, and measure (p. 240). But Justinian decreed that it should be available for all kinds of things: this was the effect of a *Constitutio* (C. iv. 18, 2), whereby he abolished, or rather amalgamated with the *actio constitutæ pecuniæ*, another civil action, called *receptitia* (2), which was somewhat analogous to it. Hence the word *pecunia* in this case signifies not merely a sum of money, but every article of commerce (D. 50, 178, B. 2, t. 1).

Q. What is the *actio de peculio*?

§ 10. A. It is an action whereby a *pater-familias* is compelled to discharge the obligations contracted (*ex contractu*) by his *filius-familias*, or his slave, to the extent of their *peculium*. By the civil law (*ipso jure*), the *pater-familias* was not bound by such obligations (B. 1, t. 9); but it seemed to the prætor just (*æquum*) that the *pater-familias* should be bound to the extent of the *peculium* of the *filius-familias*, or of the slave, who had respectively bound themselves; for the *peculium* was considered as in some sort

(1) The *constitutum* given for the debt of another, is a sort of guarantee, but it produces no *novatio*: the only result to the creditor is a power of making his demand for another thing, or in another place, or at another time, or against another person.

(2) It seems that in early times money-dealers (*argentarii*) were employed to transact a man's business, and, indeed, creditors preferred to be paid by them, because their coin was not so likely to be false. Thus the bare promise of an *argentarius* to pay for his client came to be enforced by the civil *actio* called *receptitia*. But this *actio*, at first confined to *argentarii*, was afterwards allowed, under the name *constitutæ pecuniæ*, to any person who, without *stipulatio*, undertook to pay a debt (p. 263). The term *constituere* replaced the term *recipere*,—both signifying to settle a day upon which something is to be done.

the patrimony of him to whom the pater-familias intrusted the management thereof (1).

Q. Is it merely in respect of obligations arising out of contracts that the action *de peculio* is granted?

A. No: it is also granted in respect of obligations arising *quasi ex contractu*, but not in respect of obligations arising *quasi ex delicto* (B. 4. t. 5, § 2) (2).

Q. Is the action *de peculio* properly a special action?

§ 10. A. No: it is a mere modification of the several actions arising out of obligations contracted by a person *alieni juris*. When, therefore, a filius-f. or a slave sold anything, or received anything in deposit, the magistrate always granted against the pater-f. an action *ex vendito*, *depositi*, &c., but not for a greater amount than the *peculium* (*de peculio*).

Q. Explain the action *ex jurejurando*.

§ 11. A. When one of the parties tendered an oath to the other at his request (*postulante adversario*), there arose a species of arrangement, by which the parties undertook to abide by the statement made upon oath as to the existence or non-existence of a debt; so that if the demandant, at the defendant's request, swore that a debt was due to him (3), the defendant had to pay. This, however, was nothing more than an obligation arising out of a *nudum pactum*, which the civil law did not recognise: but which the prætor did, by creating the action *ex jurejurando*, in which

(1) The *peculium* here alluded to is obviously that whereof the father is proprietor, and consequently, in the new law, the *peculium profectitium* alone; the pater-f. cannot be bound in respect to the *peculium castrense* or *quasi castrense*, nor even as to the *peculium adventitium*, which belongs to the filius-f. (p. 113). But the filius-f. himself must be sued, for he is bound by the civil law. So that, if the whole debt cannot be recovered from the pater-f., because it exceeds the *peculium*, the filius-f. may, in any case, be sued for such excess. So also the slave is a debtor but *naturaliter tantum* for the debt which he has contracted.

(2) But against the master there was the action *noxalis* (t. viii.) Observe also, that when the filius-f. was condemned for a *delictum*, the pater-familias was bound by the *actio judicati de peculio* (D. 15, 1, 3, § 11), for the *sententia* (judgment) raised a new obligatio, which worked a *novatio* of the old debt; and by virtue of this *obligatio*, resembling that raised by a *stipulatio*, the pater-f. was sued *de peculio*.

(3) It would be the same thing if the defendant relieved the demandant from taking the oath, when the demandant was prepared to take it.

the *condemnatio* of the defendant was made to depend, not upon whether there had or had not been an obligation, but upon whether or not an oath had been regularly taken (1).

Q. The personal prætorian actions which have engaged us till now are for the purpose of giving effect to, or confirming certain agreements: but did not the prætors also introduce certain penal actions?

§ 12. A. Yes: such as the actions *de albo corrupto*; *de patrono aut parente in jus vocato*; *de in jus vocato vi exempto*: the actions *de dejectis vel effusis*; *de suspensis vel positis* (t. 5, ante), and many others.

Q. Against whom was the action *de albo corrupto* granted?

§ 12. A. Against those who damaged or caused damage to be done to the prætor's *Album*, or white board, on which the edict was inscribed in black characters, and which was exhibited in the Forum for public information.

Q. Against whom was the action *de patrono aut parente in jus vocato* granted?

§ 12. A. Against any of the issue, or the freedman who had summoned an ancestor or patron *in jus* without the prætor's permission. The penalty was fifty pieces of gold.

Q. Under what circumstances was the action *de in jus vocato vi exempto*?

§ 12. A. The law was, that a defendant having received a summons to appear before the magistrate (*in jus*), and having disobeyed it, might be compelled to appear by force. Now, to prevent the defendant's friends from attempting to resist such compulsion, the prætor invented this action, which lay against those who used, or caused to be used, any violence for the purpose of preventing the defendant being brought *in jus*. It gave the plaintiff who was bringing the defendant before the magistrate a right to receive from the party using violence a sum equal to the subject-matter of the suit, without prejudice to the plaintiff's claim against the original defendant.

Q. May not the actions *præjudiciales* be included under the class of real actions?

§ 13. A. Yes: (*præjudiciales actiones in rem esse videntur*, § 13). For the question in the *præjudicium* was framed in general terms: the *judex* was commissioned to inquire whether a man was free, or whether a man was a freedman;

(1) The *judex*, therefore, had only one fact to inquire into, *viz.*, the taking of the oath, and so the action *ex jurejurando* was *in factum*.

or whether a man was the son of such an one (*partu agnoscendo*). Consequently the defendant was not named in the *intentio*, which in this case constituted in fact the whole formula.—To determine questions of status, however, was not the sole object of the *actiones præjudiciales*; for sometimes their object was to determine the amount of a debt, and even then they would not be considered personal, unless the obligation itself was disputed.—The majority of the *actiones præjudiciales* were of prætorian origin. Justinian tells us that the *præjudicium* in respect of liberty (*an liber sit*) was almost the only one derived from the civil law.

Q. Might a man claim back a Thing, belonging to him, by *condictio* (proper)? (p. 241).

§ 14. A. No: for the formula of that action proves that the defendant was not to be condemned unless he was bound to transfer the property (*si paret dare oportere*). Now the person holding my property cannot be bound by any such obligation; for I cannot be made proprietor of that which is already mine.—But, from the hatred shown to thieves, and in order to make them liable to a greater number of actions, it was held that, besides the *actio furti*, by which a person was bound to pay the double or quadruple value, they should be liable to *condictio*, though the proprietor was also entitled to a real action against them (B. 4, t. 1).

THIRD DIVISION.—Q. How are actions divided in reference to the purpose for which they are brought?

§ 16. A. Into three classes: actions *rei persequendæ gratia comparatæ*, i. e., actions by which a man claims back that of which he has been deprived, either by something belonging to him having been carried off, or by his not having received something due to him: *penal actions* (*pænæ persequendæ*), by which a man sues for a pecuniary *condemnatio* as for a penalty: and *actiones mixtæ* (mixed), by which a man sues both for the Thing itself and for a penalty.

Q. What actions were *rei persequendæ gratia*?

§ 17. A. All real, and the majority of personal actions, arising out of contracts. But the *actio depositi ex quibusdam casibus* (§ 23), i. e., for a deposit made in case of fire, disturbance, destruction of a building, or shipwreck, was *mixtæ* if brought against the party with whom the Thing had been deposited (*depositarius*), or against his *hæres*, who had proved guilty of fraud (1); for the *condemnatio*

(1) If the *hæres* was not sued for his personal fraud (*de dolo*)

was raised to the *double* value, in order to punish a faithless *depositarius* who took advantage of the distress of a depositor (p. 244).

Q. Were all actions arising from a wrong (*ex delicto*) merely penal?

§ 18. A. No: some were merely *penal*, others *mixed*. Amongst the former we include the *actio furti*, for its only object, whether brought for the double or the quadruple value (p. 298), was to obtain the penalty for the wrong. For, besides this action, the proprietor who had been robbed might have an *actio in rem*, to claim back his property in the Thing; or, as we have said, a *condictio* for the purpose of obtaining, in any case, the value thereof in money (p. 339). On the other hand, the action *vi bonorum raptorum* was *mixed*, because the quadruple value included not merely the penalty, but also the Thing itself (B. 4, t. 2). So the action of the *lex Aquilia*, for damage wrongfully caused (*injuria*), was *mixed*, not merely when a person brought an action for the double value against another who denied the damage (*adversus inficiantem*), but sometimes also, though the action was brought only for the single value (1); e. g., when a man had killed a slave who was blind of one eye, or lame, and who was, within the year, of great value, and without blemish, the master was entitled to demand the highest price which the slave reached during the year, and consequently something more than he had lost. A *mixed* action was also allowed against those who waited to be summoned, *in jus*, before delivering up to churches and other religious establishments what had been left to them as legacies, or by way of trust (*fidei-commissum*); for in such cases, persons were compelled to give the thing or sum be-

ipsum § 17), but for that of his predecessor, the action against the *heres* was for the single value only, because the penalty was claimed only from the actual wrong-doer, and not from his *heredes*, in which case it was simply *persequendæ rei gratia*.

(1) At first sight it would seem that the *actio legis Aquiliæ* cannot be granted for the single value; for either the person causing the damage disavows it, and then the action is for the double value, or he avows it, and then no action is granted, according to the maxim, *confessus in jure pro judicato habetur*. But it should be observed that the action in question may be allowed *ad æstimandum*; the parties agreeing as to the fact of damage may disagree as to its amount, and then the action for the single value is granted: *in hac actione iudex non rei judicandæ sed æstimandæ datur*.

queathed, and as much more, by way of a penalty, so as to make up the *condemnatio* to the double value (§. 19).

Q. Are there not some actions called *mixed*, in a different sense from that which has been explained, but still in a sense derived from the result which they involve?

§ 20. A. Yes; some actions are called *mixed*, because they have a double effect, and confer on the *judex* a double power, viz., as to the *Things* and as to the *persons* (*tam in rem quam in personam*); as to the *Things* which he may adjudicate upon, and as to the persons whom he may condemn. Such are the three actions *familia erciscunda* (for partitioning the *hereditas*), *communi dividundo* (for dividing a *Thing* held in joint property), and *finium regundorum* (to settle the boundaries), for in them the *judex* may adjudge, according to equitable principles, the *Things* to either party, and may condemn the one whose portion is too large, to make up to the other the deficiency in money; moreover, he has power to condemn either party, by reason of the obligations by which each may be respectively bound, either to restore the fruits or to give any other indemnity (*post*, t. 17).

FOURTH DIVISION.—Q. How are actions divided as to the amount of the *condemnatio*?

§ 21. A. Into actions for the single, the double, the triple, or the quadruple value (1); i. e., actions for the purpose of obtaining a *condemnatio* equal to, or the double, or the triple, or the quadruple of that which is stated in the *intentio*,—in other words, of that which the demandant insists has been taken from him.

Q. When was the action for the single value granted by the *prætor*?

§ 22. A. Whenever it was *rei persequendæ gratia*; amongst the *penal* actions some were granted for the single value; such as the *actio de in jus vocato vi exempto*.

Q. When was the double value sued for?

§ 23. A. In case of theft *nec-manifestum*; in case of damage under the *lex Aquilia*; in case of deposit *ex quibusdam casibus*; in case of corrupting a slave (2); in case of legacies bequeathed to religious establishments.

(1) *In simplum, in duplum, &c.* There is no action for the *five-fold* value (§ 21). It is probable that in actions granted for the single value, the *condemnatio* in the formula amounted to a sum equal to that stated in the *intentio* (*si paret X millia dare oportere X millia condemnna*), and that in actions for the double, triple value, &c., the *condemnatio* was a multiple of the sum in the *intentio*.

(2) The action for corrupting a slave (*servi corrupti*), is granted

Q. Was there no distinction between the various actions for the double value which you have enumerated?

§ 26. A. Yes: some of them were in every case granted by the prætor for the double value, as actions for theft *nec manifestum*, and for corrupting a slave; others were granted for the double value only in case there had been a denial (*inficiatio*), as in the action of the *lex Aquilia* and the deposit *ex quibusdam casibus*; or in case of delay, as in the payment of legacies bequeathed to religious establishments (§ 19).

Q. When was an action brought *in triplum*?

§ 24. A. Justinian allowed such action against any one, who, in setting forth his demand (*in libello*), demanded more than his due, in order that the officers (*viatores id est executores litium*, § 24), might require of the defendant a larger sum in fees (*sportularum nomine*), for these bore a certain proportion to the sum demanded. The defendant was entitled to three times the estimated damage suffered in this way; but the amount of damage stood for one, so that the penalty was only double (1).

Q. When was an action brought *in quadruplum*?

§ 25. A. In actions, for instance, *furti manifesti*; *quod metus causa*; in actions against men bribed to make a false charge against another (*calumniæ causa*), or to abstain from so doing. Moreover, Justinian allowed an action for the fourfold value against such officers as demanded higher fees than those to which the law entitled them.—It should be observed, that the action *quod metus causa* differed from the other actions for the recovery of the fourfold value, in this, that its nature was such as to allow the judge to acquit the defendant, if, in compliance with an order (*jussu*) of the judge, he restored to the demandant that which had been obtained from him by fear; whereas in the *actio furti manifesti*, for instance, the defendant was in every case condemned to pay the fourfold value (§ 27).

against any person who has excited the slave of another to withdraw himself by flight from the power of his master, or to rebel, or to fall into loose habits; in short, against any person who has made him vicious in any way. In this action the amount of the condemnation includes the value of the things the slave may have carried off in his flight.

(1) Under Justinian an action was brought, by the plaintiff presenting a petition signed by him (*libellus conventionis*), which contained a statement of his claim. This *libellus* the magistrate directed to be delivered to the defendant by an officer of the court. This method replaced the old *in jus vocatio*.

FIFTH DIVISION.—Q. How are actions divided in regard to the extent of the powers of the *judex*?

§ 28. A. Into actions of good faith (*bonæ fidei*), actions of strict law (*stricti juris*), and arbitrary actions (*arbitrariæ*).

Q. What do you understand by actions of good faith?

§ 28. A. This term was applied to those in which the *judex* had power to determine, not simply according to the strict civil law, but according to equity or good faith (1). Such are the actions raised by sale and purchase, letting and hiring, *negotiorum gestio*, *mandatum*, *depositum*, partnership, *tutela*, *commodatum*, pledge: actions *familiæ erciscundæ*, *communi dividundo*, and the action *præscriptis verbis*, raised by exchange or the unnamed contract called *de æstimato* (2); and lastly, the *petitio hereditatis* (3).

Q. Which are the actions *stricti juris*?

A. Those in which the *judex* is not authorized to decide according to equity, but must decide according to the civil law, adhering strictly to the terms of the contract. Such are actions *ex stipulatu* and *ex testamento*, the *condictio* raised by a *mutuum* (4), and actions raised by wrongs.

Q. What is the difference of result as to *compensatio* or set-off between actions *bonæ fidei* and *stricti juris*? (*vide p. 293*).

(1) The term *bonæ fidei* is derived from the mode in which the *judex* was clothed with authority to take into consideration those circumstances, which in equity would modify the obligation of the defendant, the mode adopted being to add to the *intentio* of the formula the words *ex fide bona* (*vide* Gaius, 4, § 47; Cic. 3, Offic. 17). The creation of actions *bonæ fidei* and of *exceptions* (t. 13 *post*), the purpose of both being to meet fraud and to mitigate the strictness of the primitive law of the Twelve Tables, marks the transition from the *jus civile* to the *jus gentium*. In actions *bonæ fidei*, observe, the *judex* was called *arbiter*, in opposition to the *judex* in actions of strict law.

(2) This contract arises when a thing has been delivered to an agent to be sold at a particular price, so that, if sold above such price, the excess shall go to the agent; and if not sold at all, it shall be restored. As there was a doubt whether it amounted to a sale, a hiring and letting, a partnership, or a *mandatum*, the *actio præscriptis verbis* was allowed (p. 237).

(3) It is a question whether these actions include all those *bonæ fidei*. But probably they are mere examples.

(4) It may be observed that the actions of strict law (*stricti juris*), were the proper means of enforcing unilateral contracts and

§§ 30, 39. *A.* The power possessed by the *judex*, in actions *bonae fidei*, to estimate the good or bad faith of the parties, implicitly authorized him to fix the amount of the *condemnatio* on equitable principles (*ex aequo et bono*); and therefore, if the demandant was himself bound by some obligation to the defendant, the *judex* would estimate the engagement of each party, and would condemn the defendant to pay the sum due by him, after proper deductions for sums due to him by the demandant; nay, would not condemn the defendant to pay anything if he was creditor for a larger sum than that for which he was proved to be debtor.

Indeed this is the only way in which a set-off could operate. For the co-existence of two obligations, one on either side, did not prevent each of them existing in the eye of the civil law; in other words, set-off was not a mode of extinguishing obligations by that law. Nor again, by that law, had the *judex* power to give the benefit of a set-off; he was required to condemn the defendant to pay the entire debt raised by a *stipulatio* or by a testament, &c., without making any inquiry as to whether the defendant was not himself a creditor of the demandant on other accounts (1).

But this doctrine of the old law was changed, for Justinian decreed, that a set-off of things clearly ascertained (*quæ jure aperto nituntur*, C. IV., 31, 14, 1), should be admitted as a matter of right (*ipso jure*) in all actions whatever, both real and personal, except in the actio *depositi*, or in an action against one who had laid violent hands on the property of another (2).

quasi contracts, whereas actions *bonae fidei* were the means of enforcing those contracts or quasi contracts, which give rise to synallagmatic or mutual obligations.

(1) A *judex* required a special authority by the formula to enter upon such an inquiry—an authority which was conferred when the prætor, in accordance with the rescript of M. Aurelius, added to a formula *in jus concepta*, the *exceptio doli*. For this exception excluded from the general order to condemn the case of fraud; so that the *judex* was directed to acquit the defendant if the plaintiff owed him a sum equal to the claim, or at least not to condemn the defendant without subtracting the sum due by the plaintiff; for it is clearly a fraud in a plaintiff to demand a sum from another to whom he owes an equal sum (tit. *Exceptiones*).

(2) This would lead us to suppose, that in Justinian's time there still existed *actions* and *exceptions*; but these words were no longer used in their proper and original sense. Under Justinian the magistrate was held to receive from the law the *action* and *exception*, which the *judex* formerly received from the prætor.

Q. Was not the action *rei uxoriæ* one of the actions *bonæ fidei*?

§ 29. A. Yes: the following were the changes introduced by Justinian. Formerly a woman had two actions to recover her dowry (*dos*), the action *rei uxoriæ* and the action *ex stipulatu* (1). The latter could arise only from a formal *stipulatio*; but it was the more advantageous of the two chiefly for the woman: 1st. Because, from the very fact of its being *stricti juris*, the husband was obliged to give back the dowry entire, without any such deductions (e. g., on account of the necessary expense of preserving the *dos*) as were allowed in the *actio rei uxoriæ* (§ 37). 2nd. Because it obliged him to restore the dowry forthwith, whereas, in the *actio rei uxoriæ* there was a certain delay, at all events, when the *dos* consisted of consumable articles (p. 240). But Justinian abolished the action *rei uxoriæ*, and allowed the wife in all cases, even when there was no *stipulatio*, the action *ex stipulatu*; curiously enough, however, he declared that the action *ex stipulatu* should become (in this case alone), an action *bonæ fidei*. This action accordingly allowed the husband the benefit of competence, and the space of a year for restoring the *res dotales*, not being immovables, for these had to be restored forthwith (§ 37, p. 350).

(1) In order to ascertain whether the dowry was to be restored, and to whom it was to be restored, a distinction was made in the old law as to its origin, and the mode in which the marriage was dissolved. The dowry (*dos*) was *profecticia* when it came from a paternal ancestor of the wife, *adventicia* when it came from any other source.—When the marriage was dissolved by the pre-decease of the woman, the husband was not bound to give back the *dos profecticia* except to that ancestor, if still living, who granted it; nor was the husband bound to restore the *dos adventicia* to him who granted it, or to his hæredes, except where such restitution had been promised by a *stipulatio*.—In case of divorce, or the pre-decease of the husband, the dowry (*dos*) *profecticia* or *adventicia* was to be restored to the *femme sole*, if she was *sui juris*, but if she was not, then jointly to the woman and the ancestor, to whom she was subject. This restitution was enforced by the action *rei uxoriæ*, which, however, did not always descend to her hæredes. But Justinian allowed the action *ex stipulatu* (even though there was no express *stipulatio*) to the woman and her hæredes, without distinguishing whether the *dos* was *adventicia* or *profecticia*, or whether the marriage was dissolved by the death of the wife or of the husband.

Q. Did not Justinian grant the wife another advantage?

§ 29. A. Yes: he allowed her an implied *hypotheca*, or rather a prior charge over the goods of the husband; for the wife was preferred to the creditors who had *hypotheca*, even although prior in date, which is contrary of course to the general principle. This right of preference, however, only attached when the wife herself (*cum ipsa mulier*) sued for *dos* (§ 29): for it did not pass to her *heredes*, at least not to all of them, and it is doubtful whether it always passed to the children.

Q. What are the actions *arbitrariæ*?

§ 31. A. Those which authorize the *judex* to determine the satisfaction to be given by the defendant to the demandant, and to acquit the defendant in case he gives the satisfaction decreed. In this species of action the *condemnatio* takes effect, provided not only the fact or the right set forth in the *intentio* is proved, but provided also the defendant fails to give the satisfaction imposed on him by the *judex* (*nisi arbitrio judicis actori satisfaciatur condemnari debeat*) (1).

Q. Are these *arbitrariæ* actions both real and personal?

§ 31. A. Yes. All the real actions are *arbitrariæ* except the *petitio hereditatis*, which is the only real action *bonæ fidei*. Amongst the *personal* actions which are *arbitrariæ* we may mention the action *quod metus causa*; the action *de dolo malo*; the action whereby a man claims something promised in a fixed place (*de eo quod certo loco promissum est*); and the action *ad exhibendum*. For in them the *judex* is allowed to arbitrate, having regard to the principles of equity and the nature of the business (2), as to how the demandant shall be satisfied,

(1) The order of the *judex*, determining the satisfaction, is binding upon both the demandant and the defendant. The demandant cannot refuse the satisfaction fixed by the *judex*; and the defendant may be compelled, *manu militari*, by public force to do what the *judex* has ordered, *e.g.*, to restore the Thing claimed, if in the defendant's possession. Herein the *jussus* or *arbitrium* of the *judex*, who fixes the satisfaction to be furnished by the defendant, differs from the *condemnatio*, which is always to the effect that a certain sum shall be paid (Gaius, 4, § 48).

(2) *Veluti rem restituat vel exhibeat vel solvat vel exnoxali causa servum dedat*, § 31.—In real actions the satisfaction prescribed by the *judex* was always to restore the thing. But in the action *serviana* and *quasi-serviana*, the defendant was left to choose whether he would give up the thing pledged by *hypotheca* or pay the debt.

and to acquit the defendant if he produces the satisfaction required.

Q. May the *sententia* (judgment) of the *judex* be for sums of money or Things indeterminate?

§ 32. A. No: not even when an action is brought for Things or sums which are indeterminate, as in the action *ex testamento*. Where the claim is *quicquid ex testamento dare vel facere oportet*, the *judex* ought, as far as possible (1), to decree the restitution, or to condemn the defendant to the payment of Things or sums of money which are determinate: for without that the *sententia* (judgment) is null.

Q. When is there a *plus-petitio*?

§ 33. A. When the demandant includes in his demand (in the *intentio* of the formula) more than his due: and this happens in four ways. 1. *In regard to the Thing (re)*: when a man demands a larger sum than is due, or claims the whole when he is entitled only to a portion of a Thing. 2. *In regard to the time (tempore)*: when a man demands absolutely that which is due at a particular time, or subject to a condition; it is obvious that 100 crowns paid to-day are more valuable than 100 crowns paid in a year. 3. *In regard to the place (loco)*: when a man demands in one place that which the debtor has promised to pay in another place, no allusion being made to the place agreed upon for payment; e.g., when a man demands absolutely at Rome that which he has stipulated should be paid to him at Ephesus: for such demand goes to deprive the promisor of the advantage of paying at Ephesus (2). 4. *In regard to the cause of ac-*

When the Thing claimed back was restored, voluntarily or by force, to the demandant, the *condemnatio* might also include fruits and other accessories thereof. If the defendant found it impossible to restore it, and that from his own fraud, his *condemnatio* was fixed at an amount settled by the oath of the demandant.

(1) In some cases it is impossible for the *judex* to determine the precise subject-matter of the *sententia*, as when one out of several things is due, or when a thing is due generally; for the selection belongs to the debtor, and so the *judex* cannot, without curtailing the debtor's right, determine the precise Thing to be paid.

(2) This may be a great advantage; for particular merchandise may be much more valuable in one place than in another. When, therefore, a man demands at Rome that which the debtor has promised to pay elsewhere, he should not state absolutely that there

tion: when, in the *intentio* of the action in which the subject-matter of the obligation is defined, we deprive the debtor of the right of selection belonging to him; as when a man, having stipulated for 10,000 *sesterces* or the slave *Stichus*, limits his demand to one of these two things: for in such case, even though the thing demanded may be of less value (*licet vilissimum*) than the other, still, as it may be more convenient for the debtor to give the thing which is not demanded of him, the demand is considered exorbitant. So also, if a man having stipulated for a Thing in general, a slave, for instance, should fix upon a particular slave, the slave *Stichus*, and should demand him, there would be *plus-petitio*.

Q. What is the effect of *plus-petitio*?

§ 33. A. By the old law, he who demanded more than his due lost his cause; that is, was deprived of his rights (*rem amittebat*) (1); and the only means of relief was by a *restitutio in integrum*; but unless a person was under twenty-five it was difficult to prevail on the prætor to grant *restitutio in integrum* (B. 1, t. 23). But if the demandant's mistake was such as the most prudent man might well commit, the prætor extended his protection to one above twenty-five, as he did to one under that age: for instance, where a man demanded a legacy entire, and the defendant produced codicils of which nothing was known before, revoking the legacy in part, or containing legacies to other legatees, so as to make the first legacy subject to be reduced to three-fourths of its amount by virtue of the *Lex Falcidia*.

But the old law on this point was abolished by Zeno

is an obligatio (*pura intentio*), but should add that there is an obligatio to pay in a particular place (*certo loco*) (p. 346); the action thus becomes arbitrary; so that in the *condemnatio*, the judex, if the debtor does not satisfy the creditor, may take into account the advantage to the debtor from his right to pay in the place agreed upon, as he may also take into account the advantage to the creditor from his right to be paid there, if the place has been fixed with a view to the creditor's advantage.

(1) For the *condemnatio* was made conditional on proof of the *intentio* (*si paret X millia dare oportere*). Now if the defendant owed less than the sum stated in the *intentio*, this condition, which could alone justify the *condemnatio*, was not fulfilled, and the defendant was necessarily acquitted. This followed from the formula system, and therefore ceased with it.

(C. 3, 10, 1. 2.) and by Justinian. The Constitution of Zeno provides only for a *plus-petitio*, by reason of *Time*: the result being that the delay (*i. e.*, the time to elapse before the period arrives for performing the contract) is to be doubled in favour of the defendant, and that, after the lapse of that time, the demandant shall not be entitled to bring a fresh action until he has paid the expenses occasioned by his premature demand. The Constitution of Justinian declares, that any person who has demanded too much in any other way than in respect of *time*, shall be condemned to pay the defendant three times the damage caused by such demand.

Q. Does a person who demands less than is due to him run any risk?

§ 34. *A.* No (*sine periculo agit*); but, according to the old law, not only was it necessary to bring a fresh action to demand what remained due, but such action could not successfully be brought during the same prætorship (Gaius, 4, § 56). Zeno, however, dispensed with the necessity of a fresh action; for he authorized the *judex* to award *condemnatio* for the whole, even though the original demand had only been for part.

Q. Does a person who demands one thing instead of another incur any loss?

§ 35. *A.* No (*nihil eum periclitari*, § 35). Formerly, a man who did so, *e. g.*, a man who demanded the slave *Eros*, when it was the slave *Stichus* to which he was entitled, or a man who demanded a Thing by virtue of a testament, when it was due to him by virtue of a *stipulatio*, might bring a fresh action (Gaius, 4, § 55); because the *res judicata* could not be set up against the demandant, since the fresh action did not arise in regard to the same subject-matter, or was not founded on the same claim. In course of time, however, the demandant was allowed to amend his original demand (*in eodem judicio*), so that it was no longer necessary to bring a fresh action, *i. e.*, *nihil periclitari*.

SIXTH DIVISION.—Q. Does a person always in an action get all that is due to him?

§ 36. *A.* No. There are some actions in which persons may get sometimes the *whole*, sometimes *less than the whole*; *e. g.*, the action *de peculio*, which is granted against the *pater-familias* to recover a sum equal to the *peculium*, and no more; so that, if the obligation incurred by the *filius-f.* or slave exceed the *peculium*, the demandant does not get the whole. In like manner a man recovers *less*

than the whole when there is ground for a set-off, or when the defendant enjoys the *beneficium competentie*.

Q. What is the *beneficium competentie*?

§ 37. A. It is that peculiar right granted to certain persons, which saves them being condemned to an amount beyond what their means allow (*quatenus facere possunt*), i. e., beyond such an amount as they can pay without depriving themselves of the necessities of life (D. 50, 17, 173).

Q. To whom was this benefit allowed?

§ 37. A. To a husband sued for the recovery of a dowry (1); to ancestors or patrons sued by their descendants or their freedmen; to the partner sued by his co-partner; to the donor sued by reason of a gift (§ 38); lastly, to the debtor sued by the creditors, to whom he had made a *cessio bonorum* (an assignment of all his goods), in respect to property acquired after the *cessio* (§ 40) (2).

TITLE VII.—OF ACTIONS GRANTED IN RESPECT OF TRANSACTIONS WITH A PERSON ALIENI JURIS.

SEVENTH DIVISION.—Q. Was a person bound only by his own act?

Pr. A. By the strict civil law, no person could bind himself except by his own act: the mandator was not even bound to him who had negotiated with his *mandatarius* (person commissioned). But the prætors thought it equitable that in certain cases a party should be bound by the act of another, and hence the distinction between *direct* and *indirect* actions. *Direct* actions are those granted against a person on account of his own act (3): *indirect* actions are

(1) Justinian, after saying *dotis repetitio minuitur*, adds, that the necessary expenses diminish the dowry *ipso jure*, that is, without the need of any *exceptio*. An *exceptio* was required, according to the old law, in the *actio rei uxoriæ* alone, but the deductions made from the sum of the dowry were not merely the necessary (*impensæ necessariae*), but also the useful expenses, i. e., the sums laid out in improving the property (*impensæ utiles*).

(2) Observe, that the *beneficium competentie* is a personal privilege, and therefore does not advantage the *heredes* or the *fidei jussores* (*sureties*).

(3) Actions are called *directæ* in a different sense when opposed to actions *contrariæ* (p. 243). Again, actions are called *directæ* when brought under the precise circumstances for which they were created, in which case they are opposed to *actiones utiles*, which

those which do *not* arise from the act of the party against whom they are granted, but from an engagement contracted, or a misfeasance committed by some person under the defendant's power, or from damage caused by some animal belonging to him (t. 9, *post*).

Q. Mention the *indirect* actions granted by the prætorian law against the *pater-familias* in respect to contracts made with his *filius-f.* or slave.

A. There are six: the actions *quod jussu*, *exercitoria*, *institoria*, *tributoria*, *de peculio*, and *de in rem verso*.

Q. Explain the action *quod jussu*.

§ 1. A. It is an action granted against the *pater-familias* or the master, to compel him to discharge entirely (*in solidum*) such obligations as his *filius-f.* or his slave may have incurred by his order (*jussu*). The prætor, in introducing this action, followed the principles of equity; for he who, under such circumstances, treated with the *filius-f.* or the slave must have relied on the credit of the *pater-familias*.

Q. Explain the action *exercitoria*.

§ 2. A. This is an action granted against the master who put forward his slave, or against the *pater-f.* who put forward his *filius-f.*, as commander of a vessel, by reason of contracts made by such commander in regard to the business intrusted to each of them. Such contracts being made in seeming conformity with the wish of the master or the *pater-f.*, the prætor held it equitable to grant, as against the master or the *pater-f.*, an action for the whole debt. This action is called *exercitoria*, because the *exercitor* is the name for the person to whom the ship's daily profits (*quotidianus navis questus*) belong.

Q. Explain the action *institoria*.

§ 2. A. This is an action granted against a master or a *pater-f.*, who have respectively given a slave or a *filius-familias* of theirs charge of a certain business, to enforce liabilities incurred by such slave or *filius-f.* in reference to the business which each has been appointed to conduct. The action is called *institoria*, because the person charged with the management (*præpositus*) is called *institor*; and it is granted for the recovery of the whole claim.

Q. Are the actions *exercitoria* and *institoria* granted

are granted on principles of analogy,—the right to bring them being extended to cases similar to those for which they were originally created (p. 72).

except when a slave or a filius-familias is the person to whom the management is given?

§ 2. *A.* They are allowed also when the person to whom management is given is a freeman, or a slave not under the power of the person who gives him the management, because the same principle of equity applies.

Q. Explain the action *tributoria*.

§ 3. *A.* When a filius-familias or a slave employed the whole or part of his *peculium* (*peculiari merce*) to carry on a business of which his pater-f. or master had notice, and when a person contracted with either of them in regard to such business, the prætor held that the whole *business-fund* (*quicquid in his mercibus erit*) and the benefits arising therefrom, should be distributed proportionally between the master, if anything was due to him, and the other creditors who should demand payment. And since the prætor authorized the pater-f. or the master to make such distribution, if any of the creditors complained that the proper portion had not been assigned to him, the prætor granted to such plaintiff this *actio tributoria*.

Q. Explain the action *de peculio*.

§ 4. *A.* This is an action granted to those who have made contracts with the filius-f. or the slave, against the pater-f. or the master, in order to compel either of these last to pay a sum equal to the *peculium*, though neither pater-f. nor master have given their consent to the obligation (*sine voluntate domini*) (1). In order to estimate (*cum autem*) the value of the *peculium*, you must first deduct the sum which the slave or the filius-f. owes to his master or pater-f., or to the person subject to the power (*potestas*) of the latter, and the remainder is the *peculium*. Sometimes, however, you do not deduct from the *peculium* that which the filius-f. or the slave owes to a person subject to the power of the pater-f. or the master: *viz.*, when such person himself constitutes a portion of the *peculium*, *e. g.*, a *vicarius servus*: for in that case any sum which might be paid to such *servus* would become part of the *peculium*; there would be *confusio*.

Q. Explain the action *de in rem verso*.

§ 4. *A.* It is an action granted by the prætor to those who have made contracts with the filius-f. or the slave, against the pater-f. or the master, on account of, and up to

(1) If the obligation was contracted with the consent of pater-f. or master, there was an action *quod jussu*.

the value of, the profit which has accrued to the pater-f. or the master (*si quid in rem ejus versum fuerit*). As profit accruing for their benefit, we reckon all sums expended necessarily or profitably on behalf of the pater-f. or master by the filius-f. or the slave; e. g., money borrowed by them to pay creditors, or to support a dilapidated building, &c.

Q. Was it possible to claim *de peculio* and *de in rem verso* in one and the same action?

§ 4. A. Yes: and such was the common course (1); because the creditor might often by such means recover the whole debt, where a part only would be recoverable by one of these actions. When such was the course the formula contained two *condemnations* (*duas condemnationes*), and the judex had first to examine whether any benefit had accrued to the master or the pater-f.: and if he determined that none had, or that they had not profited by the whole amount, he had then to estimate the value of the *peculium*. Thus, suppose the slave of Sempronius borrowed of Titius ten sesterces, suppose he paid five to the creditors of his master, and expended the other five in any way he pleased, a *condemnatio* would be pronounced against Sempronius for the whole five sesterces, of which he had reaped the benefit; and as to the five others, *condemnatio* would be pronounced against him to the extent of the *peculium*.

Q. May the same transaction raise the action *quod jussu*, or the action *institoria*, or *exercitoria*, and also the action *de peculio*, or *de in rem verso*?

§ 5. A. Yes: and it is for the creditor to select which he pleases. Hence, as the text says (§ 5), it would be absurd to abandon the action *quod jussu*, or the action *institoria*, or *exercitoria*, by means of which we may easily recover the whole of our debt, and subject ourselves to the difficulty of proving that the master or the pater-f. has derived a profit, or that the slave has a *peculium*, and that sufficient to pay the whole. Again, he who may bring the *actio tributoria* may also bring the *actio de peculio* and *de in rem*

(1) This seems to be the meaning of § 4: not that actions *de peculio* and *de in rem verso* constitute only one action, for each of them may be enforced separately, one after the other. In the Digest the title *de peculio* is distinct from the title *de in rem verso* (D. 15, t. 2, and 3). The action *de in rem verso* is perpetual, whereas the action *de peculio* is open only for one year after the death of the slave, or after any other event putting an end to the *peculium*.

verso, and the creditor may select whichever he thinks best. When a large sum is due to the master or to the pater-f. out of the *peculium*, it is generally best for the creditor to bring an action *tributoria*, because by it neither master nor pater-f. has any privilege, *i. e.*, no deduction is made for any sum due to either of them, and they are in the same position as the other creditors; whereas in the action *de peculio* you begin by deducting the sum due to the master or pater-f., and the *condemnatio* in favour of the creditors is only for the surplus of the *peculium* after such deduction. On the other hand, and especially where a small sum is due to the master or to the pater-f., it may be the better course for the creditor to bring an action *de peculio*, because it affects the whole of the *peculium*; whereas the action *tributoria* affects only such part of the *peculium* as may be included in the *business-fund* (*tantum quo negotiatur*): there is yet a further reason for bringing an action *de peculio* where some profit has accrued from the obligation to the pater-f. or the master, because then you may bring an action *de peculio* and *de in rem verso* at the same time.

Q. As to these actions of which you have spoken, was it the same whether the obligation was contracted by a *filius-f.* or by a slave?

§ 6. A. No: not always (*eadem fere jura pr.*). There were cases in which the slave could not bind his master even *de peculio*, but in which the *filius-f.* could bind his pater-f. (1). On the other hand, there was one obligation which when contracted by the slave, bound the master *de peculio*, but which when contracted by the *filius-f.* did not bind the pater-f., *viz.*, the obligation arising from a loan of money. For the *Sc. Macedonianum*, passed with the view of putting down usury and preventing the dangerous abuses caused by loans made to *fili-f.*, decreed that any person who lent money to a *filius-f.* (2) without the consent of the pater-f. of the borrower, should have no right of action either against the pater-f. or against the *filius-f.*, even though the latter should become *sui juris*.

Q. You say that actions *quod jussu* and *de in rem verso*

(1) A *filius-f.* might become surety for another, but a slave might not.

(2) According to Theophilus this *Sc.* was passed in regard to one Macedo, who, being encumbered with debts, in consequence of sums borrowed by him when a *filius-f.*, made an attempt upon the life of his father, in order to procure his patrimony. D. 14, 6, 1.

are *indirect prætorian* actions; but Justinian says (§ 8) that a man may bring a *civil* and *direct* action, viz., *condictio*, against any pater-f. or master who has directed a contract to be made, or has derived any benefit from a contract, just as if such pater-f. or master had himself contracted: now, these *direct* actions already existing, why introduce *indirect* actions?

A. Probably by *direct* actions Justinian alludes to the new law; for it seems that the *indirect prætorian* actions were not abolished, but that certain *direct* actions were added—being admitted in practice and sanctioned by the jurists (*condicti PLACET*). Observe, however, that the only *direct* action was the *condictio*, and that it was confined to two cases: 1. When a person contracted with a filius-f. or slave, by direction of the pater-f. or master; for then the credit was given to them. 2. When profit accrued to the pater-f. or master by the contract. Now *condictio* (originally confined to the recovery of *pecunia certa*) never applied except to enforce unilateral contracts, or where credit had been given (D. 12, 1, 9, 2), or profit derived (D. 12, 1, 23, 32); hence the necessity for these *indirect prætorian* actions, for they were required to enforce bilateral contracts—involving mutual obligations—such as *emptio-venditio*, *locatio-conductio*, &c., which might be made by a slave for his master, and to enforce which the *condictio* was inapplicable (p. 356 n).

TITLE VIII.—OF ACTIONES NOXALES.

Q. Might the master be sued for wrongs (*delicta*) committed by his slave?

Pr. A. Not *directly*: but leave was given to sue him *indirectly* by an *actio noxalis* (1). An action is called *noxalis* which arises *ex delicto*, or *quasi ex delicto*, and by which the defendant is allowed either to pay the amount of the *condemnatio* (*litis æstimationem*) or to abandon the cause of damage to the demandant.—*Noxa* (§ 1) means the

(1) A master cannot be sued *de peculio* on account of wrongs committed by his slave; for when a man intrusts his slave with a *peculium*, though he authorizes him to make contracts in regard to it, he cannot be considered as authorizing the commission of wrongs. An *actio noxalis* cannot be brought unless the wrong committed by a slave is a *private wrong* (*privatum delictum*), for as to *public wrongs* (crimes), the slave himself is the person to be accused and punished.

cause of the injurious act, viz., the slave, and *noxia* the act itself, as theft, theft with violence (*rapina*), *injuria*, &c.

Q. Upon what ground was the master allowed to discharge himself by abandoning the *noxa*?

§ 2. A. Because it would have been unjust that the wrongful act of the slave should expose the master to lose more than the slave himself who did the wrong.

Q. Whence are *actiones noxales* derived?

§ 4. A. Either from the *civil* or the *prætorian* law: from the civil law we have the *actio furti manifesti* which is derived from the Twelve Tables; the action for *damage wrongfully caused* (*damni injuriæ*), which is derived from the *lex Aquilia*; from the prætorian law we have the *actio injuriarum*; and that for *theft with violence* (*rapina*). Observe, the *actio noxalis* is not a distinct and separate right of action: it is the ordinary action raised by a particular *delictum*, but so modified as to allow the master to discharge himself by abandoning the *noxa*. Hence an action does not cease to be an *actio furti*, *legis Aquiliæ* (1), &c., though it is *noxalis*.

Q. What was the effect of abandoning the *noxa*?

§ 3. A. The master, who discharged himself by so doing, alienated for ever his property in the slave. The person to whom the thing was abandoned, became proprietor; but the prætor compelled him to enfranchise the slave, if such slave obtained money and made compensation for the wrong (*damnum resarciert*), i. e., by producing a sum equal to the *condemnatio* awarded for the same. The reason of which must be that, the damage being thus repaired, there was no ground upon which the master could retain a power acquired only by reason of such damage.

Q. Against whom is the *actio noxalis* granted?

§ 5. A. Against the person in possession of the slave at the time of the *litis contestatio*: for the *actio noxalis* follows the guilty *caput* (2). If, therefore, your slave has committed a wrong, the action is against you so long as he continues under your power (*potestas*), but the moment he comes under the power of another, that other is

(1) For the whole difference is, that the *condemnatio* is in the alternative either to pay or to abandon the slave, instead of simply to pay. So the actions *quod jussu*, *de peculio* are the ordinary actions *empti-venditi*, *locati-conducti*, but modified by the prætor.

(2) Here is a *personal* action, *quæ caput sequitur*, a proof that the characteristic of real actions does not consist in the fact that they are granted against every possessor.

the person against whom the action should be brought. When the slave is a freedman, he is himself directly liable, and the action is no longer *noxalis* (*extinguitur noxa deditio*). *Vice versâ*, a direct action may become *noxalis*: for suppose a free man commits a wrong and then becomes a slave (B. 1, t. 3), his master will then be liable in an *actio noxalis*, whereas before such change of status the action must have been *directa*.

Q. Does the wrong committed by a slave against his master raise any action against such slave?

§ 6. A. No: for there can be no obligation (1) between the master and the slave subject to his power. Thus, even when the slave becomes free, or comes under the power of another, no suit can be brought, either directly against the slave or by *actio noxalis* against his new master. Therefore, if the slave of another man, after being guilty of a wrong to me, happens to come under my power, the action is extinguished (*intercidit*), because the circumstances are such as to negative the possibility of an action existing. In like manner, if a master do any wrong to his slave, such slave, even though enfranchised or alienated, can bring no action.

Q. Is a pater-f. subject to an *actio noxalis* on account of wrongs committed by his son?

§ 7. A. Formerly he was: but the pater-f.'s right to abandon his son, and especially his daughter, to the person who had suffered damage, ceased with the progress of civilization, so that under the later law *actiones noxales* were used only in case of slaves. Permission, however, was given to sue directly the filius-f. who committed the wrong: and when condemned, an action *de peculio* was allowed against the father, for the *condemnatio* decreed against the son (B. 1, t. 9; B. 4, t. 6, p. 337).

TITLE IX.—OF THE ACTION ARISING FROM DAMAGE OCCASIONED BY A QUADRUPEL.

Q. Does damage occasioned by an animal give rise to any action?

Pr. A. When any four-footed animal, contrary to the natural habits of its species (2), causes damage without

(1) *Nulla obligatio*, i. e., no civil obligation.

(2) *E. g.* (Pr.), when a restive horse kicks, or when an ox inflicts an injury with its horns. The law of the Twelve Tables

having been urged on by any person (1), the law of the Twelve Tables allows the *actio noxalis de pauperie* against the owner of the animal, by which he is bound to pay the amount of the damage or to deliver up the animal, in satisfaction of the damage (*si noxæ dedantur*).—*Pauperies* denotes the damage caused without any wrong on the part of that which occasioned it (*sine injuria*). Now there can be no wrong on the part of an animal which is devoid of intelligence.

Q. Does not the edict of the Ædiles contain certain provisions intended to prevent damage by dangerous animals?

§ 1. A. Yes: that edict forbids any person having on the public way a dog, a wild boar, a bear, or any other animal likely to do injury, whether from being left free, or from being so tied up as not to be incapable of causing damage. If that edict was disobeyed, and a free man was killed, the proprietor was condemned to pay 200 solidi; but if such free man was only wounded, the amount of the *condemnatio* was settled by the judex; in all other cases of damage the penalty was double the injury. This penalty might be sued for independently of the action *de pauperie*; for, says Justinian, when several different actions, especially penal actions, may be brought on account of the same thing, the employment of one does not exclude the employment of another (*alia aliam consumit*) (2).

allowed no action *de pauperie* when the animal inflicted the damage from the natural ferocity of its nature, *e. g.*, when the damage was caused by a lion or a bear. Nevertheless there was an *actio utilis*, which was also granted in case any animal not being a quadruped occasioned the damage. Moreover, when damage was done by a fierce animal which had escaped from its master, there was another reason why he should not be held liable to an *actio noxalis de pauperie*, *viz.*, because he was no longer proprietor of the animal.

(1) If the animal had been urged on by any one, the person who so urged it on would be liable to the *actio Legis Aquilia*.

(2) This proposition, limited though it be, is not accurate. We have seen, for instance, that one who is entitled to the action *vi bonorum raptorum* is also entitled to an *actio furti*, but he must elect between them. The ground upon which the right exists to bring both the action *de pauperie* and the *edilition* action is this, that they do not both arise out of one and the same fact; the first arises out of the *damage*, the second out of disobedience to the edict.

TITLE X.—OF THOSE BY WHOM A MAN MAY SUE.

Q. By whom may an action be carried on?

Pr. A. Either by the person whose rights are injured, or by another in his name; e.g., a tutor, a curator, or a procurator.

Q. Did this power to sue in the name of another always exist?

Pr. A. No. Formerly, that is, in the times of the *legis actiones*, a citizen was not allowed to sue in the name of another except in three cases; *pro populo*, when a popular action (one open to any of the people), (p. 311), was brought; *pro libertate*, when a person constituted himself *assertor libertatis*, and brought an action against one who claimed to keep as a slave another, alleged to be free (1); *pro tutela*, (apparently) where from the *pupillus* being incapable of acting himself, even with the *auctoritas* of the tutor, the tutor was authorized to bring the action *tutorio nomine*. Moreover, the *lex hostilia* allowed an *actio furti* to be brought, in the name of those who were prisoners in the hands of the enemy, or absent in the service of the Republic, as also in the name of those under *tutela*. Lastly, we find that a person admitted as *vindex* of a citizen summoned *in jus* (B. 3, t. 12), pleaded in such citizen's name.

Under the formula system, the right of being represented *in jure* became general, and besides tutors and curators, we find successively, *cognitores*, *procuratores*, and *defensores*, admitted as such representatives.

The *cognitor* was a representative appointed by formal words pronounced before the magistrate (*in jure*), in presence of the opposite party. This representative was identified with the demandant or the defendant (*dominus litis*) (2), so that the *sententia* (judgment) given for or

(1) It was not thought decorous for a slave to have a dispute with his master; an *assertor* was therefore authorized to make the claim for him. This interference of the *assertor* continued till the time of Justinian (p. 13).

(2) The *cognitor* did not appear in the *intentio*, but in the *condemnatio* of the formula. If, for example, Titius sued as *cognitor* of Mævius, the *intentio* would have the name Mævius, *si paret Negidium Mævio sestertium X millia dare oportere*, but the *cognitor* would appear in the *condemnatio*, *iudex Negidium Titio sestertium X millia condemna* (Gaius, 4, § 86).

against the *cognitor* had the same effect as if given for or against the person who appointed him. Hence the demandant represented by a *cognitor* could not again bring the same action, or if he did, it was repelled by the exception *rei judicatæ* (t. 13). Lastly, the *cognitor* was bound to account to the person who had appointed him, to whom in this respect he was as a *mandatarius* to a *mandator*.

The appointment of a *cognitor*, however, was troublesome; for it was necessary that both plaintiff and defendant should appear before the magistrate. This led to the introduction of *procuratores ad litem*. The *procurator* did not require to be named either *in jure* or by formal words: indeed he might be appointed by an absent person: he was, in fact, a mere *mandatarius* commissioned to carry on a suit for the *mandator*. Now, by the strict principles of the civil law, the *mandatarius* was not identified with the *mandator*; and, when he acted in the execution of a *mandatum*, he bound himself, saving such recourse as he might have against the *mandator* (p. 350). Accordingly, the *procurator ad litem* was himself the person condemned or acquitted, and the judgment (*sententia*) had no direct effect against the party whom he represented (1), so that such party might, in strictness, have brought a fresh action, without its being possible for the prætor to refuse to grant such action, or for a defendant to set up successfully the exceptio *rei judicatæ*. Hence the *procurator* was required, if he represented the demandant, to give the *cautio rem ratam dominum habiturum*: if he represented the defendant, the *cautio judicatum solvi*. But this formal strictness was gradually relaxed. First of all, tutors and curators were admitted to sue in respect of the rights of their pupils, and in such case the *judicatum* was a direct advantage or the contrary to the minor. Afterwards a *procurator* presented to the magistrate (without formal words) by the party appointing him (*procurator præsentis*), and a *procurator* nominated by a public act, *apud acta*, were both assimilated to the *cognitor*.

The *defensor* was one who appeared to plead instead of another, without having received any *mandatum*. He was, in fact, *negotiorum gestor*. Generally the *defensor* could

(1) The formula, when a *procurator* pleaded was the same as in case of a *cognitor*, i. e., the *intentio* was framed in the name of the *dominus* of the *procurator*, and the *condemnatio* in the name of the *procurator*.

represent none but the defendant (1). The *sententia* (judgment) given directly, affected the defensor alone; he was bound to give the *cautio judicatum solvi*; and when, out of the usual course, he represented the demandant, the *cautio rem ratam dominum habiturum*.

Q. In the latest period of the law were there still *cognitores*?

A. No: after the old forms were disused, there were no *cognitores* (2). The *procurator presentis* was not bound to give *cautio* (security), nor was the *procurator absentis*, if he received his *mandatum* by a public act; the *defensor* alone was bound to give the *cautio de rato* or *judicatum solvi*. A judgment passed for or against the *procurator presentis* had the same effect as if it had been passed for or against the person represented by him: the same occurred when the *procurator absentis* was appointed *apud acta*, or when the *dominus* (principal) confirmed the interference either of a *procurator* or even of a mere *defensor*.

TITLE XI.—OF CAUTIONES (SECURITIES).

Q. Were not certain securities required of the litigant parties?

Pr. A. Yes; but they were different under the new law (*novitas*) from those under the old law (*antiquitatis*), i. e., under the formula system.

Q. Mention the *cautiones* (securities) furnished under the old law by the litigant parties, in a real action.

Pr. A. The defendant who continued in possession during the suit, was required to give the *cautio judicatum solvi*. This *cautio* had a threefold purpose: the surety (*fidejussor*) guaranteed, 1. That the amount of the *condemnatio* should be paid, in case the defendant should be condemned and should not restore the thing (*de re judicata, pro litis æstimatione*); 2. That the defendant should appear before the *judex*, and should continue before the court until the conclusion of the suit (*de re defendenda pro sua persona*, p. 363); 3. That the defendant should use no fraud (*de dolo malo*, D. 46, 7 6), (3).—If the defendant

(1) He undertook the defence of a party attached, hence the name.

(2) In the Pandects, interpolations were made in the old jurists, by substituting throughout *procuratores* for *cognitores*.

(3) By this third clause in the security, the surety was respon-

did not furnish the *cautio judicatum solvi*, the demandant was put into possession of the subject-matter of the suit, provided that he agreed himself to furnish such cautio.—If the defendant acted in the name of another, *à fortiori*, the *cautio judicatum solvi* was required of him; for it was a general principle that a man could never have his defence conducted by another, without a cautio being given (see next question).

The demandant was not bound to give any cautio, at least when suing in his own name or as *cognitor* (1); but if he was suing as *procurator*, he was required to give a *cautio de rato*, because, inasmuch as the judgment (*sententia*) against the *procurator* did not directly bind the *dominus litis*, the *cautio ratam rem dominum habiturum* became indispensable as a guarantee for the defendant, since it gave him the means of indemnifying himself, in case the *dominus litis*, instead of confirming the acts of his *mandatarius*, began a fresh action (B. 4, t. 10).

Q. Mention the cautiones formerly furnished by the litigant parties in a personal action.

§ 1. A. In a personal action the same course was followed as to the demandant, as we have described in case of a real action; that is, he was not required to give any cautio when he sued in his own name, or as *cognitor*, but he was required to give the *cautio de rato* when he sued as *procurator*.—As to the defendant, he was not required to give any cautio when he appeared in his own name: but the *cautio judicatum solvi* was required when he appeared in the name of another: for it was a general rule that *nemo defensor in aliena re sine satisfactione idoneus esse creditur*. So strict, indeed, was this rule, that it applied, even when the representative of the defendant was a *cognitor*; in that case, however, the cautio was furnished not by the *cognitor*, but by the person whom he represented (Gaius, 4, 101) (2).

Q. Was it not the same with tutors and curators as with procurators?

Pr. A. Yes: they were bound to give the same secu-

sible, if, for instance, the defendant, on being condemned, restored the chattel in a *condition deteriorated* by any act of his.

(1) We have already seen that a *cognitor* was identified with the person he represented in court, so that the action carried on by him was considered as the action of the *dominus litis* (his principal). It was therefore useless to subject him to the *cautio de rato*.

(2) At least generally (Gaius, 4, 102).

rities; though in some cases they were relieved from giving *cautio* when they were demandants (*his agentibus*). But when they were defendants, they were of course subject to the rule *nemo defensor*, &c.

Q. What cautiones were required under the new law?

§ 3. 1. Under it, whatever the nature of the action, the demandant was never required to give *cautio* when he sued in his own name; but when he sued as *procurator*, he had to give the *cautio de rato*, unless appointed in presence of the judge, or by a public act (*mandatum actis insinuatum*) (§ 3).

§ 2. The defendant who appeared in his own name was not bound, even in a real action, to give the full security implied in the *cautio judicatum solvi*: he was not bound to give *cautio* for the value of the thing in dispute (*pro litis æstimatione*, § 2), but he was bound in every case to give *cautio* to appear in person, and to continue in court till the end of the suit (*pro sua persona, quod in judicio permansat usque ad terminum litis*, § 2) (1). This guarantee, moreover, was not always in the form of a *cautio* (proper), i. e., by *fidejussor*: for sometimes, having regard to the rank and fortune of the person, it was thought enough to have either a *cautio juratoria* (B. 1, t. 24), that is, an oath, or a mere promise.

§ 4. When the defendant was represented by *procurator*, or by a mere *defensor*, it was always necessary that the *cautio judicatum solvi* should be given to the demandant; for the old rule, *nemo alienæ rei sine satisfactione defensor idoneus intelligitur* (§ 5), continued in force. But if the defendant (*aliquis convenitur*) was present and desired to appoint a *procurator*, he might himself, either before the judge (*in judicio*) or elsewhere (*extra judicium*), constitute himself *fidejussor* of his attorney (*mandatarius ad litem*), undertaking all the liabilities included in the *stipulatio judicatum solvi* (*pro omnibus satisfactionis clausulis*): in which case, moreover, he subjected all his goods to a *hypotheca*. Lastly, such defendant gave *cautio* that he would appear in person when judgment (*sententiæ*) was pronounced (*quod tempore sententiæ recitandæ, in judicio invenietur*). A judgment delivered against a *mandatarius* thus guaranteed (*procurator præsentis*) had the same effect

(1) This guarantee was called *cautio in judicio sisti*: its object being to indemnify the demandant for any loss he might incur by being compelled to have recourse, in case of the defendant's non-appearance, to the forms of procedure for contumacy.

as if delivered against the *mandator* himself.—If the person sued was absent it was the duty of the person acting as his *defensor* to furnish the *cautio judicatum solvi*. The judgment had then no direct effect, except against the official representative, saving always the right of such representative against the person represented, either by means of an *actio mandati* or by the *actio negotiorum gestorum*.

TITLE XII.—OF ACTIONS PERPETUAL OR TEMPORARY, AND OF THOSE WHICH MAY BE BROUGHT BY HEREDERS, AND WHICH MAY BE ENFORCED AGAINST HEREDERS.

EIGHTH DIVISION.—Q. How are actions as to their duration divided?

Pr. A. Into *perpetual* and *temporary*. Civil actions, *i. e.* created by a Law, a *Senatus Consultum*, or Constitution, might be brought at any time (1), until certain imperial Constitutions laid down a fixed period within which actions, whether real or personal, must be brought (2); but actions derived from the *prætorian* law did not continue beyond one year, for that was the limit of the *prætor's* authority (*imperium*). Sometimes, however, *prætorian* actions were assimilated as to the period during which they might be brought, to actions *legitimæ*, as was the case with actions granted to the *possessores bonorum*, and to

(1) Observe, however, as to *vindicatio* which claimed the property, that this right of action was extinguished when the property was extinguished by *usucapio*.

(2) In A.D. 424, Theodosius II. decreed that no action, whether real or personal, should be brought after thirty years (C. vii. 39, 3). His successors, particularly Anastasius and Justin, confirmed this rule, extending, however, the period of time, in some cases, to forty years. So that in the new law actions are called *perpetual* which may be brought for thirty or forty years, and *temporary* which must be brought sooner.—Observe that this limitation of thirty or forty years in case of real actions, though it limited the time during which the proprietor might claim back the property, did not usually transfer the property, for it was not a mode of acquisition like *usucapio*, or the *prescriptio* of ten and twenty years created by Justinian (p. 103). Hence the proprietor, though he could not sue a person who had been in possession for thirty or forty years, and who had not acquired title by *usucapio*, might still claim back the property from a third party who had obtained possession, and who could not avail himself of a *possessio longissimi temporis*.

other parties occupying the place of the hæres (*loco hæredis*); and with the *actio furti manifesti* (1).

Q. Were all the actions, which were capable of being brought by or against a person, according either to the civil or the prætorian law, also capable of being brought by or against the hæres of such person?

§ 1. A. No. Actions arising out of contracts were granted to the hæredes of the parties, as well as against them (2). As to penal actions arising out of a delictum, or *quasi-delictum*, it is an universal rule in law that they do not lie against the hæres of the person committing the delictum (pp. 303, 311), but that they may be brought by the hæres of the party interested; indeed the only actions which do not descend to him are actions for *injuria*, and such like; for death extinguishes all rancour (pp. 153, 306). Nevertheless, penal actions descend to the hæres, who may be either plaintiff or defendant, provided only the suit has been already begun, and the question already settled by the prætor for the *judex* between the original parties; because in truth the *litis contestatio* works a *novatio* (3), and because the defendant is thereafter no longer to be bound

(1) Most of the prætorian *penal* actions might be brought for one year only (the period of the prætorship); the action *furti manifesti* was perpetual, because derived from the Twelve Tables, the prætor having merely substituted a pecuniary for a capital penalty (Gaius, 4, § 111). Most of the prætorian actions *rei persecutorie*, especially those which aimed at carrying out the principles of the civil law, were perpetual (p. 333).

(2) Sometimes, however, says Justinian (§ 1), an action, though arising out of a contract, does not lie against the hæres; e. g., when the deceased has committed a fraud, but no advantage has thereby accrued to his hæres. But this is too general: for there was in fact only one case in which the fraud of one of the contracting parties did not make his hæredes liable to the same action for which he himself was liable: viz., where there was an action *in duplum* for a deposit made from necessity (t. 6, ante). For it is clear law that, in contracts, an action founded upon the fraud of one of the parties, also lies against his hæredes. Justinian took his proposition from Gaius (4, § 111): but in the time of Gaius, there were several actions; e. g., those against *sponsores* and *adepromissores* (p. 263), which, though arising from contracts, were not allowed against the hæredes; but in Justinian's time they were obsolete.

(3) The Romans marked the successive modifications of the defendant's obligation thus: before action he was said to be bound *dare*; after the *litis contestatio* *condemnari*; after condemnatio pronounced *judicatum facere* (*oportere*) p. 316.

by virtue of the *delictum*, but by the obligation raised by *litis contestatio* (p. 320): nevertheless, the hæres of the party committing the wrong would be bound by the penal action, if he had derived any benefit from the delictum of the deceased, and that to an extent equal to the benefit derived (D. 4, 3, § 26).

Q. Suppose the defendant, before judgment, satisfied the demandant, was it the duty of the judex to acquit?

§ 2. A. Yes. Formerly so held the Sabinians, who said that all actions were *absolutory* (Gaius, 4, § 114): and their opinion was sanctioned by Justinian (*omnia judicia absolutoria*); but the Proculeians argued that the question on which the *condemnatio* depended was, whether a particular *obligatio* or *factum* existed at the time when the action was granted, and maintained that the judex could not avoid pronouncing the *condemnatio*, if the defendant at that time was liable to be *condemned*.

TITLE XIII.—OF EXCEPTIONS.

Q. What is an *exception*?

Pr. A. It is an equitable restriction introduced by the prætor, upon the general order to condemn given to the judex by the action. It was called *exceptio*, because it excepted or took away from the effect of the action.

Q. Explain the origin and use of exceptions.

§ 1. A. It often happened that the demand of the plaintiff, though just in strict civil law (*justa*), was unjust in equity (*iniqua*). For instance, by the civil law, no question was made as to how a *stipulatio* arose: its existence was enough to create an obligation on the part of the respondent, even though his promise had been extorted by violence (*metus causa*) or by fraud (1). But, to decree execution of such promise would have been to violate equity; and therefore, to prevent this, the prætors adopted the plan of giving the judex, not a *general* order, directing him to decree according to the principles of strict law, whereby the defendant would have suffered an unjust (*iniqua*) *condemnatio*, but a *conditional* order, in these terms: *You shall pronounce condemnatio, unless there has been fraud or violence, or, You shall pronounce condemnatio,*

(1) For fear, or mistake on the part of the promisor, are not amongst the causes nullifying *stipulationes*: it is otherwise in case of a promise made by a person imbecile or a pupillus.

if there is no fraud, &c. (*si in ea re nihil dolo malo factum sit neque fiat*, Gaius, 4, § 119). This restrictive order to condemn, this equitable condition subjoined to an action founded on principles of the strict law, was called an *exceptio* (1).

Q. It would seem, then, that an exception is unnecessary when the grounds of defence are admissible by the strict civil law, and therefore such as the *judex* is bound to recognise (p. 381) ?

A. Yes (2): and that this is so may be proved by many texts (D. 2, t. 14, 7, § 4; and 17, § 1, Gaius, 4, § 106-7). From which, also, we conclude, that the exceptions, or, at least, the *exceptio doli*, is unnecessary in actions of *bona fides*; because the very nature of such actions permits the *judex* to look to the various circumstances showing fraud, which however, in actions *stricti juris*, he could only regard by virtue of an *exceptio* (3).

Q. Exceptions are of prætorian origin: but Justinian tells us (§ 7) that there are certain exceptions founded on the law.

§ 7. A. Yes; because the prætorian law was often adopted as part of the civil law, which gradually became, in fact, one with it, in *unam consonantiam*. Thus laws or other legislative acts (*legibus vel iis qua legis vicem obtinent*) confirmed the exceptions introduced by the prætors, or created new ones similar to them, but always for the purpose of mitigating the rigour of the original law, the law of the Twelve Tables (4). Thus a rescript of Marcus Aurelius

(1) Observe, the defendant by his *exceptio* did not admit the truth of the *intentio*: it had to be proved.

(2) The *exceptio* was only required when the defendant could not avail himself of his defence *ipso jure* (that is, by the civil law, and not, as it is sometimes translated, *as of right*). Thus, the *exceptio pacti conventi*, raised by a pact of release, was useless in case of a consensual obligation, because mere consent dissolved such obligations *ipso jure* (p. 289). Hence § 3, which mentions the *exceptio pacti conventi*, must be understood to refer to a *stipulatio*; which is not extinguished *ipso jure* by mutual consent.

(3) Therefore Ulpian says, that in actions *bona fidei*, the exceptions are implied (*exceptiones insunt*) (D. 2, t. 14, 7, § 5.) And Cujas (3 Obs. 17) maintains that if an *exceptio doli* was added to an *actio stricti juris*, it was changed into an *actio bona fidei*.

(4) The law of the Twelve Tables, notwithstanding the many modifications successively introduced into it, notwithstanding the

allowed an *exceptio doli* in an action *stricti juris* to any person who desired to avail himself of a set-off (*compensatio*), p. 344. Thus also, after the *hæreditas fideicommissaria* was transferred (*restituta*), the hæres, if sued by the creditors of the *hæreditas*, had the exception *restituta hæreditatis*, by virtue of the Sc. *Trebellianum*: because, according to strict law, (*ipsum jus*), *condemnatio* must have been pronounced against him (p. 186).

Q. Were exceptions, like actions, framed (*conceptæ*) *in jus* and *in factum*?

§ 1. A. Yes: an exception was *in jus* when it raised a question of law; *in factum* when it raised a question of fact. The exception *doli mali*, or *quod metus causa*, was framed *in jus*, because it required the *judex* not merely to examine the facts, but also to come to a conclusion upon them; for it is not any set of facts which constitutes fraud or violence. Nevertheless the prætor, instead of decreeing that the *judex* should condemn, *unless there was fraud or fear*, might instruct him to condemn, *unless a particular fact had taken place; e. g., unless the demandant had threatened the defendant with a dagger*, in which case the exception was *in factum concepta* (§ 1, *in fine*) (1).

Q. Under what circumstances could a man claim an *exceptio*?

§ 6. A. They are too many for enumeration. Having already mentioned the exceptions *doli mali*, *quod metus causa*, and *pacti conventi*, we shall follow the Institutes, by confining ourselves to the exceptions *non numerata pecuniæ* (consideration unpaid), *jurisjurandi* (oath tendered), *rei judicatæ* (thing adjudged).

Q. Explain the use of the *exceptio non numerata pecuniæ*.

§ 2. A. When a person, before lending a sum of money or other *res fungibilis* (p. 240), stipulated with a promissor for the sum of money or *res* (2), but afterwards refused to make delivery to the borrower, such promissor was bound by the *stipulatio*, even though no payment had in fact

fictions with which it was encumbered by the prætors and jurists, continued to be the basis of Roman Law.

(1) The *exceptio doli* made the person against whom it was proved *infamous*. Hence it was more common to grant an *exceptio in factum* against the patron than one *doli mali*: for it was a freedman's duty to have a care for the reputation of his patron.

(2) *Quasi credendi causa*, i. e., made the defendant promise, as if he, the plaintiff, were going to lend the sum of money.

been made by the stipulator (1); but, as it would have been unfair (*iniqua*) that a promissor should be condemned in such a case, the prætor allowed him the exception in question. The time during which this *exceptio* might be pleaded was reduced by Justinian to two years (B. 3, t. 21).

Q. When was the *exceptio jurisjurandi* granted?

§ 4. A. When a debtor, on oath tendered to him by the creditor, swore that he owed nothing, he continued bound; for an oath was not one of the causes whereby an obligation could be extinguished by the civil law. But the defendant was entitled to the *exceptio jurisjurandi* to get rid of the condemnatio (2).

Q. Did the *res judicata* give rise only to an *exceptio*? Did it never prevent a fresh action being brought?

§ 5. A. Under the system of the *legis actiones* no second action could be brought for the same cause. But under the formula-system it was different, for, according to Gaius (B. 4, § 103, *et seq.*), all *judicia* were *LEGITIMA* OR *IMPERIO CONTINENTIA*. When the action was at Rome, or within the first milestone, between Roman citizens and before a single *judex*, also a Roman citizen, the action or *judicium* was *legitimum*; but when the action was in the provinces, or between suitors, one of whom was not a Roman citizen, or before a *judex*, not a Roman citizen, the *judicium* was *imperio continens*. Now, the *judicium legitimum*, like the old *legis actio*, being once begun, and the *judex* once appointed, went on till judgment; but the *judicium imperio continens*, which derived its whole effect from the magistrate who granted it, expired with his term of power: *imperio continetur*. Thus it was, that in the provinces all suits ceased with the change of governor. Further, as to their effects: the *judicium imperio continens* never extinguished the original right of action, so that if a second action was brought for the same cause, it had to be repelled by the *exceptio rei judicatæ*; but as to the *judicium legitimum*, there was a distinction: if it was *in rem* or *in factum*, the right of action was not extinguished,

(1) It would be the same if there had been an obligation *litteris* constituted by the *chirographum*, and subscribed before the money was paid (p. 268).

(2) Exceptions were granted, not merely in personal, but also in real actions. When, therefore, on oath tendered by the demandant, the possessor swore that the thing belonged to him, he was entitled to the *exceptio jurisjurandi* (§ 4), in case the demandant brought *vindicatio*.

for, as these were not brought to enforce an obligatio, there was none upon which the obligatio raised by the *litis contestatio* could operate so as to extinguish the cause of action by *novatio*, and hence the necessity for an exceptio if a second action were brought for the same cause; but if the *judicium legitimus* was *in jus*, the right of action was extinguished, for the obligatio raised by the *litis contestatio* operated by *novatio* to extinguish the original obligatio, so that no exceptio *rei judicate* was necessary if a second action were brought for the same cause. But these distinctions ceased when Rome became one with the provinces, and when all freemen of the empire became Roman citizens: all *judicia* were assimilated to these *imperio continentia*, and hence Justinian's general proposition, that *res judicata* gives rise to an *exceptio* (1.)

Q. How are exceptions divided?

§ 8. A. Some are *perpetual* and *peremptory*, others are *temporary* and *dilatory*.

Q. Define *perpetual* and *peremptory* exceptions.

§§ 8, 9. A. Those always allowed to the defendant whenever the demandant sued (i. e., demanded his action from the magistrate); e. g., the exception of fraud (*doli*), or *pacti conventi*, where it had been agreed that the creditor should never make his demand (*omnino*).

Q. Define *temporary* exceptions.

§ 10. A. Those allowed only during a fixed time, after the lapse of which they could not be introduced into the formula. For instance, if the creditor, instead of agreeing that he should make no demand at all, promised to make no demand for *five years* (2), the exception *pacti conventi* would be temporary; for, after that limited period, the exception would no longer be available. Temporary exceptions were also called *dilatory*, because they did not absolutely put an end (*perimunt*) to the rights of the demandant, like perpetual exceptions, but merely compelled him, if he wished to avoid the penalties of *plus-petitio*, to postpone the exercise of his rights (*quæ ad tempus nocent*).

(1) The *exceptio rei judicate* had to be pleaded in actions *bonæ fidei*, being allowed more on grounds of public policy, *ut sit finis litium* than upon those of equity.

(2) Observe that this refers to a period allowed by a pactum subsequent to the obligation, and not to one allowed by the obligation raised by the original contract and embodied in it; for, in this last case, if a person sued before the time, his claim was repelled *ipso jure*, according to the principles of *plus-petitio*.

Finally, according to the old law, the temporary exception was during the period of suspension quite as efficient, —quite as *peremptory* as the *perpetual* exceptio. For if the demandant brought an action before the *judex* at any time prior to the expiration of the proper period, the defendant was acquitted, and the *sententia* (judgment), which was always final, gave rise to a *perpetual* exceptio barring any future action: so that the demandant lost his right (*rem amittebant*, § 10). But after the time of Zeno (t. 6, § 33), the *plus-petitio* no longer involved a loss of rights; but the period during which the right of enforcing the contract was suspended (*inductio*) was doubled in favour of the defendant, and the creditor was not allowed to bring a new action until he had paid the expenses of the first.

Q. Were there no *dilatory* exceptions except those by reason of time?

§ 11. A. There were also *dilatory* exceptions by reason of the person: e. g., exceptions *procuratorias*, because, for instance, an action had been brought by a military man, or a woman as *procurator*; for military men could not sue as *procurators* even for their fathers, mothers, or wives, nor even by virtue of a rescript of the Emperor. But military discipline did not prevent them from managing their own affairs (1).

Q. Is there any other division of exceptions?

T. 14, § 4, A. Yes: some are *conceptæ in rem*, some *conceptæ in personam* (2) (p. 326): the former are available for every person sued by reason of the same thing, the latter are available only for one individual. Thus exceptions granted to debtors are generally available for the *fidejussores*; and properly so, for to make a demand on a surety is in some sort to make a demand on the debtor himself, for he will be compelled by *actio mandati* to restore whatever the surety has paid for him. Hence, where it has been agreed with a debtor not to demand a debt from him, the exception raised by such *pactum* is available for those who have bound themselves on his

(1) The *infamia* incurred by the person appointing a procurator, or by the procurator himself, formerly gave rise to exceptions, which were afterwards disused, and which Justinian expressly abolished, lest the matters connected with them might delay the discussion of substantial questions.

(2) *Rei coherentes*, incident to the thing; *personæ* to the person.

behalf, just as if the agreement not to sue had been made with them. But there are certain exceptions which are not available for the sureties; *e. g.*, if a debtor has made an assignment of all his goods (*cessio bonorum*), and the creditor sues him, the debtor may defend himself by the exception *si bonis cesserit* (*unless he has made an assignment of his goods*); but the fideijussores may not, because the benefit from the *cessio bonorum* is personal to the assignor, and because, moreover, if it were available for the surety, the object of the creditor in requiring the addition of a *fidejussor*, *viz.*, the obtaining payment from the fidejussor, should the debtor prove insolvent, would be defeated.

Q. When should the exception be demanded?

A. Before the formula is delivered,—before the suit is constituted (*litis contestatio*); for the question before the *judex* being ascertained, the *judex* can take no cognizance of any ground of defence not stated in the formula.

Q. Might there be several exceptions to repel the same cause of action?

A. Yes (D. 44, t. 1, 5).

Q. In the latest period of the law, had not the term *exceptio* lost its original meaning?

A. Yes: the system of exceptions depended on that of the *formulae*: after these were abolished, the exception, which then became synonymous with defence, seems to include all the means of repelling a claim (1).

TITLE XIV.—OF REPLICATIONS.

Q. What is a *replicatio*?

Pr. A. It is an allegation introduced by way of addition into the formula for the purpose of repelling and destroying the effect of an *exceptio*. The replication is to the *exceptio* what the *exceptio* is to the action.

Q. Explain the use of the replication.

Pr. A. It may happen that the *exceptio*, though apparently just, is really unjust as regards the demandant; *e. g.*, suppose a creditor has agreed with his debtor that he shall *not* demand his debt, and it is afterwards agreed that

(1) Or, at least, all those by which a claim is repelled, not by denying the facts on which it is based, but by alleging circumstances to qualify the demandant's right.

the creditor shall demand it: now if the magistrate allow the debtor merely an *exceptio pacti conventi*, the debtor must be acquitted, since the judge cannot pronounce *condemnatio* against him, except so far as there has been no agreement of release from the debt, and since the mere existence of a subsequent agreement contradicting that of release does not annihilate the *fact* of such a release (*verum manet*). Hence the demandant is allowed a *replicatio ex pacto posteriore*, framed in these terms: "If afterwards there has been no convention, whereby I may claim my debt" (Gaius, 4, § 126); and this *replicatio* destroys the effect of the *exceptio*.

Q. What if subsequently to the second pactum (embodied in the *replicatio*) there was a fresh agreement negating the second pactum?

§§ 1, 2. A. The defendant would have a *duplicatio* to repel the *replicatio*. In like manner the demandant would have a *triplicatio* to repel the *duplicatio*, the defendant a *quadruplicatio* to repel the *triplicatio*, and so on, according to the requirements of the suit.

Q. Did the demandant need a *replicatio* to repel the *exceptio doli mali*?

A. No: for the very nature of that *exceptio* authorizes the *judex* to consider all the facts, both of early and recent date, from which the fraud or good faith of the parties may be gathered. If, therefore, in the example above, instead of the *exceptio pacti conventi*, which is an *exceptio in factum*, and which therefore leaves nothing but one material fact to be proved, the magistrate had allowed the *exceptio doli mali*, then, since the mere existence of an agreement of release cannot negative the possibility of a demandant having to complain of fraud, inasmuch as the effect of such release must be morally nullified by the existence of a contradictory agreement, it follows that the defendant will be condemned under a mere *exceptio doli*, without the plaintiff being compelled to put in a *replicatio*.

TITLE XV.—OF INTERDICTS.

Q. What are interdicts?

Pr. A. Under certain circumstances, when it was required to prevent conflicts, and to repress acts of violence, and especially in disputes as to the possession of things corporeal, or the *quasi-possessio* of things incorporeal, the

prætor, instead of granting an action, i. e., instead of referring the matter to a *judex* to be examined and adjudicated upon, made an order of *command* or *prohibition*, which the parties were required to obey. This order, framed like the formula in actions (*formæ atque conceptiones verborum*), was called an interdict (*interdictum*).

Q. What happened if one of the parties did not obey the *interdict*?

Pr. A. The opposite party got an action authorizing the *judex* to investigate whether or not there had been disobedience of the interdict; and, in case it was proved that there had, to condemn the disobedient party (Gaius, §§ 4, 141, 166).

Q. It seems, therefore, that interdicts were simply a means of obtaining *condemnatio* against those who violated a rule which had been laid down by the prætor, apparently because such rule was not within the scope of the common or civil law.

A. Such appears to have been substantially the use and origin of interdicts (1). Interdicts differed from edicts in this, that the latter were general, whereas the former applied only to a particular dispute, and to the parties thereto. Interdicts were special and personal edicts, renewed each time a similar matter presented itself. Indeed, the Institutes derive the term from this very circumstance: *quia inter duos dicuntur*: so that *Interdictum* signifies *dictum inter duos*, in opposition to *edictum*, by which the prætor lays down general rules binding on all (2).

(1) It seems that an *interdict* was seldom granted except in cases where the public interest was concerned: as, where danger was apprehended to public roads or waters, or in private cases, where there might be a violation of the public peace. According to Niebuhr (II. 149), and Savigny (Poss., B. 4, 44), the private occupancy of the *ager publicus* was probably one of the earliest interests which claimed the protection of the *interdict*.

(2) Such, at least, was the common opinion as to the etymology (§ 1). Some, however, derived the term from *interdicere*, "to forbid," "prohibit," insisting that *interdicta* applied only to prohibitory orders: whilst *decreta* applied to positive orders. But this view has not been adopted.—Probably *interdicts* paved the way for *edicts*. For the prætors, we may suppose, began by laying down rules *inter duos*, in private disputes; the same rule would naturally be adopted under similar circumstances, and this soon led to the creation of the general rules of the edict. When *edicts* were in use, the prætors used them for the purpose of settling

Q. What is the general division of interdicts?

§ 1. *A.* Interdicts are, *prohibitoria*, *restitutoria*, and *exhibitoria* (1). *Prohibitory* are those by which the prætor forbids a man to do something: such as the interdict forbidding violence to be done against one who has rightful possession (*non viciosa*), or against one who is carrying a dead body to a place where he is entitled to bury it; such also is the interdict which forbids the erecting an edifice in a sacred place (*sacrum*).—*Restitutory* interdicts are those by which the prætor directs the giving up of a Thing: such is the interdict by which the prætor commands a person in possession *pro hærede* or *pro possessore* of the goods of an hæreditas (2), to give the possession thereof to those entitled by the *possessio bonorum*: such also is the interdict commanding the restitution of a chattel carried away by force.—*Exhibitory* interdicts are those by which the prætor commands the production of some Thing or person; e. g., a person whose liberty is in question; a freedman who conceals himself to avoid rendering his patron the services to which he is entitled; a son whom

possession and other matters, by laying down certain rules, and promising an action *in factum* against those who violated them (D. 43, t. 4, § 1). Nevertheless, *interdicts* continued to be granted in all cases in which it had been usual to grant them; but the prætor, in order to render his rule of action as consistent in its character as possible, promised by the *edict* to pronounce a particular *interdict*, whenever particular circumstances occurred. In the end, however, it became unnecessary actually to obtain an *interdict*, the custom being to sue just as if such *interdict* had been in fact obtained. Hence, under the Lower Empire we hear very little of *interdicts*.

(1) This division was important in regard to the procedure to be adopted in case the interdict was unexecuted (Gaius, 4, § 141, *et seq.*) When the interdict alleged to be violated was *restitutory*, or *exhibitory*, the demandant had an *arbitrary* action, i. e., one authorizing the judex to decree that the thing should be given up or produced. If the defendant obeyed this order he was acquitted: if he did not, he might be compelled to obey it by public force.

(2) He who believes himself, or at least claims to be hæres, by any title whatever, either by the *jus civile*, or the *jus honorarium*, is possessor *pro hærede*: a possessor *pro possessore* is a possessor *ut prædo*; i. e., who claims no right of property, and has no other title than the mere fact of his possession.

a pater-familias claims as subject to his power, but whom a third party detains (1).

Q. It appears, then, that *possession* was the principal subject-matter regulated by *interdicts*: how were they divided as to *possession*?

§ 2. A. Into three classes. They were granted in order to obtain the possession (*adipiscendæ possessionis*), in order to retain it (*retinendæ*), or in order to recover it (*recuperandæ*).

Q. Mention those *adipiscendæ possessionis*.

§ 3. A. The text mentions the *interdictum quorum bonorum* and the *interdictum Salvianum*.

Q. Explain the *interdict quorum bonorum*.

§ 3. A. It derived its name from the first words of the formula appropriate to it, and was allowed to the *possessores bonorum* (B. 3, t. 9), in order that they might get the *goods of a hereditas* out of the hands of one in possession thereof *pro hærede* or *pro possessore*. The use of this *interdict* is obvious, when we consider that the *petitio hereditas* was available only for the *hæredes* (proper), i. e., *hæredes* of the civil law: hence the prætor found it necessary to create this *interdict* as a means of putting the *goods of the hereditas* into the hands of those whom he had nominated *bonorum possessores*.—The *interdict quorum bonorum* was granted only to those claiming a possession which they had never had (2).

Q. But you say that this *interdict* was *restitutoria*?

A. Yes: because the word *restituere* does not mean simply to *restore*, but to put another in possession, whether such other acquires a thing for the first time or recovers it back.

Q. Explain the *interdictum Salvianum*.

§ 3. A. This *interdict*, called after Salvius, its author, was allowed to the proprietor of country-land (*fundus ruralis*), in order to his obtaining possession of every thing charged by the farmer as a security for the payment of his rent, *quas (colonus) pro mercedibus fundi pignori futuras pepigisset* (3).

(1) As to the formulæ of *interdicts*—prohibitory (D. 43, 8, 2, 20); restitutory (D. 43, 18, 11); exhibitory (D. 43, 29, 1).

(2) Those who lost possession had recourse to the *interdict unde vi*.

(3) Probably the *actio Serviana* (p. 335) was a mere extension of the *interdictum Salvianum*. In like manner, the prætors seem

Q. In what cases did the prætor grant (*comparata sunt*) interdicts *retinendæ possessionis*?

A. In three cases, *viz.*, when the possessor was disturbed and annoyed; when he had reason to fear disturbance; lastly, when he demanded possession during a suit affecting the property (1).

Q. Could an action claiming the property be framed (*actio petitoria institui*) until it was known to whom the possession did or ought to belong?

§ 4. A. No: for the *vindicatio* was required to be brought against the possessor by a person not in possession, but claiming to be proprietor. First, therefore, the question of possession had to be settled. And this question was very important; for on it depended another, *viz.*, who shall be demandant, and who shall prove the case: for the person allowed to hold possession being defendant in an action of *vindicatio*, had nothing to prove, and was secured in the possession by the mere fact that the demandant had shown no right to the property.

Q. Mention the *interdicta retinendæ possessionis*.

§ 4. A. In case of immoveables, the interdictum *uti possidetis*, and in case of moveables, the interdict *utrubi* (2).

Q. To whom did the prætor grant the interdictum *uti possidetis*?

§ 4. A. To the suitor who, at the time of granting the interdict, had, as against the other (*ab adversario*), possession *non viciosa* (3). Possession is *viciosa* as to the opposite party, when obtained from him by violent or clan-

to have paved the way for the *actio Pauliana* (p. 334), by the interdict called *fraudatorium*, the object of both being the same. The use of *exhibitory* interdicts will probably account for the origin of the action *ad exhibendum*.

(1) Theophilus points out all three cases (*ad princ. h. t.*); Gaius, (4, § 158) and the text (§ 4), mentions only the last: probably because it was the principal one.

(2) Gaius (4, § 160) has preserved the formulæ of the interdicts *uti possidetis* and *utrubi*, the names of which, like all the others, are derived from the first words of the formula. The former was thus framed: *uti nunc possidetis, quominus ita possideatis vim fieri veto*: "I forbid violence being used, so as to prevent you still possessing as you now possess."

(3) It mattered not whether the possession was *viciosa*, as to any other than the opposite party. Thus, I should not be refused an interdict against *Titius*, because I had taken the possession by violence from *Mævius*.

destine means, or *precario* (1) (*nec vi, nec clam nec precario*).

Q. To whom was the interdict *utrubi* granted?

§ 4. A. By the old law it was granted to one who had had, during the greater part of a year, quiet, public, and *non-precarius* possession as against the opposite party (2). By the new law it was granted, like the interdict *uti possidetis*, to one holding rightful (*non viciosa*) possession at the time of action brought.

Q. In order that a man might obtain these interdicts, was it required that he should personally be holder?

§ 5. A. No: for a man was deemed a possessor not only when he was in personal possession, but also when another held in his name, as in case of a farmer, or a *depositarius* (3). Possession may even be retained without actual holding, by mere intention, as where a man, though he ceases to hold a Thing, retains an intention to return (*animus revertendi*), and the will not to abandon his possession. But it is clear that intention is never sufficient to transfer or invest a man with possession: there must always be an actual taking of possession, either by a man himself or by another for him (B. 2, t. 1).

Q. Mention the interdicts *recuperanda possessionis*.

§ 6. A. The text mentions the interdict *unde vi*, granted

(1) The *precarium* was a contract whereby, on request, a grant was made to a man of the right of enjoyment of a thing, such grant being revocable at the grantor's pleasure. The grant being revoked, the holder of the thing was required to restore it, and he might be compelled so to do by the interdict *recuperanda possessionis*, called *de precario*.

(2) The interdict *utrubi* was thus framed: *utrubi* (with which-ever of the two) *hic homo, de quo agitur, apud quem majore parte hujus anni fuit, quominus is eum ducat, vim fieri veto* (Gaius, 4, 160). But how could the interdict *utrubi* be considered as one *retinenda possessionis*, when he to whom it was granted was not in possession at the time of action brought? Probably, because he who had been in possession during the larger portion of the year was, by a legal fiction, deemed in possession, even after having lost it by the acts of violence complained of.

(3) He who holds for another is in *possessione*, and not *possessor*; for a possessor must possess *animo domini*. *Possessio* is threefold: 1. Civil, *i. e.* recognized by the Twelve Tables, and leading to *usucapio*. The possessor must have the *animus domini* (p. 68). 2. Praetorian, *i. e.* recognized by the praetors, and not leading to *usucapio*, but protected by *interdict*, *e. g.* a gift of a wife to a husband (D. 24, 1, 26). 3. Natural, *i. e.* mere physical holding.

to a man when dispossessed by violence (1). In order to obtain this interdict the conditions were these :—1. The demandant must have been in possession at the time of the violence committed (*ex possessione*). 2. He must have lost such possession by an act of violence (2) (*dejectus*), committed by the opposite party himself or under his direction. 3. The thing possessed must have been an immoveable (*fundi vel ædium*); but after the Constitution of Valentinian I. (C. viii. 4, 7), which decreed that he, who had used violence to obtain possession of a Thing moveable or immoveable, should give it up, and should lose his property therein if he had acquired it, or pay the value thereof, the interdict in question was extended to moveables (§ 6).

Q. Was the man who used violence to dispossess another exposed to further penalty?

§ 6. A. He was subject to the *lex Julia* (t. 18, 8, *post*), as to public and private violence.—It was *private* violence when committed without arms; *public* violence when committed with arms: under arms we include not merely shields, swords, helmets, &c., but sticks and stones.

Q. If the person expelled had a mere *viciosa possessio*, was he entitled to the interdict *unde vi*?

§ 6. A. Yes: although a man who obtained possession *vi clam* or *precario* was not entitled to the interdict *retinendæ possessionis* (p. 377). Formerly, where there had been ordinary violence (*vis quotidiana*), the interdict *unde vi* was not granted unless the possession had been obtained *vi clam* or *precario* from the opposite party; but where there had been *vis armata*, the interdict was always granted. But this distinction was abolished.

Q. What interdicts were allowed to secure the *quasi possessio*?

A. The party molested in the exercise of a personal or real *servitus* had the interdicts *uti possidetis*, *utrubi*, *unde vi*; or special interdicts, e. g., *de itinere actuque privato* and *de fonte*, which corresponded with the interdict *uti possidetis*—the first as to the right of way, the second as to the right of drawing water.

Q. Mention the third division of interdicts.

§ 7. A. *Simple interdicts* and *double interdicts*.

Q. Explain the term *simple* interdicts.

(1) The formula began thus: *unde tu illum vi deieceristi* (Gaius, 4, § 154).

(2) Either physical or moral, as the threatening of serious and imminent danger.

§ 7. *A.* By *simple* interdicts I understand those in which one only of the parties is demandant and the other defendant; *e. g.*, the interdicts *restitutoria* and *exhibitoria*: for in them he who demands that the thing shall be given up or produced is alone the demandant.

Q. Explain *double* interdicts.

§ 7. *A.* By *double* interdicts I understand those in which each party to the suit is both demandant and defendant (1). Among *prohibitory* interdicts, some are *simple*, others *double*. Amongst the former we find those interdicts whereby the prætor forbids anything to be done in a sacred (*sacrum*) place, in a public river, or on the bank (B. 2, t. 1). Amongst the latter we find the interdicts *uti possidetis* and *utrubi*. For he who opposes the grant of such interdict, contending that the demandant has no right to keep possession, or, indeed, that he has no such possession as he claims, of necessity implies a demand to be himself put into or kept in possession.

Q. Was the proceeding by interdict used during the later times of the law?

§ 8. *A.* No. Interdicts were abolished by the new organization of the judicial powers under the Lower Empire. After the magistrates, instead of remitting questions to the judge, themselves went into the whole case and pronounced judgment—in short, after all *judicia* became *extraordinaria*—the parties were entitled to judgment to recover possession, or generally to any other remedy obtainable by interdict or otherwise.

TITLE XVI.—OF THE PENALTY IMPOSED ON RASH SUITORS.

Q. How was the rashness of suitors restrained?

Pr. A. By oaths, by a pecuniary penalty, and by infamia (2).

(1) Such interdicts are called *double*, just as some actions are called *mixed*.

(2) To prevent citizens bringing suits too hastily, there had always existed penalties. In the time of the *legis actiones*, the *sacramentum* effected this (t. 6). Under the formula system the *sacramentum* was replaced by the *sponsio* and *restipulatio*,—contracts by which one party bound himself to pay the other a fixed sum in case he did not succeed. In the end, however, these stipulationes became mere forms. But a custom was introduced of requiring from the opposite party, *juramentum calumnia*, and even

Q. What oaths were required of the suitors?

§ 1. A. By a Constitution of Justinian, the suitors had to swear that they believed they had good cause of action: and their advocates had to do likewise.

Q. What pecuniary penalty was imposed on a rash suitor?

§ 1. A. He who lost his suit was condemned to pay the other the damages and the costs (*impensas litis*) incurred. Moreover, in some cases an obstinate defendant was condemned to the double or triple value (*duplum aut triplum*): as where a man denied (*inficiantem*) the fact of a deposit having been made *ex quibusdam casibus*, or denied a *damnum injuria*, or delayed paying legacies made to religious houses until he was sued (p. 342) (1).

Q. When was *infamy* incurred by a rash suitor?

§ 2. A. When, for instance, the defendant was condemned in an *actio furti*, or *vi bonorum raptorum*, or *injuria*, or *de dolo*, or when he was condemned in direct (2) actions of *tutela*, *mandatum*, *depositum*, and partnership. Observe, however, that in these last cases *infamy* was incurred only by judgment of *condemnatio* having been pronounced: whereas, if the action arose out of theft, *rapina* or *injuria*, the *infamy* which in such cases resulted, rather from the wrongful act than from the judgment, was incurred by the mere agreement (*pacti*) to commit the offence: for as the text says, there is a great difference between the case of a man who is a debtor by a contract and him who is a debtor by a delict.

Q. State the principal effects of *infamia*.

A. An *infamous* person could neither be a witness, nor receive public honours, nor bring forward a public accu-

of having recourse to a special action, *judicium calumnie*, by which, if a man could prove that a suit had been brought merely for vexatious purposes, he was entitled to *condemnatio* for damages equal to a tenth, or a fourth, of the subject of dispute. This action was disused, but the *juramentum* became general, and Justinian made it, as we shall see (§ 1), the necessary preliminary to every suit (C. ii. 59, 2).

(1) That which a plaintiff was bound to give in case of *plus-petitio*, was a kind of pecuniary penalty against the demandant.

(2) *Actiones contrariae* of *tutela*, *mandatum*, and *depositum*, (i. e. actions by the tutor against the pupillus, by the mandatarius against the mandator, by the depositarius against the depositor), were not punished with *infamy*.

sation, nor, before Justinian's time, *postulare in jure*, for another (t. 18, § 11) (1).

Q. May we not consider, as one means of restraining rash suits, the fact that the prætor prohibited certain persons being sued (*in jure*) without his permission?

§ 3. A. Yes: thus, under a penalty of fifty solidi, he forbade children to sue their ancestors, and freedmen to summon their patrons without his permission (B. 4, t. 6).

TITLE XVII.—OF THE DUTY (2) OF THE JUDEX.

Q. What is the first duty of the *Judex*?

Pr. A. To give judgment according to the Law, the *Senatus-consulta*, the Constitutions, and the unwritten Law (*moribus*) (3).

Q. Had a judgment in direct violation of the civil law any effect?

A. No: it was ipso facto null, without any appeal (p. 309). It was different if a *judex* merely committed a mistake; e. g., by taking an alleged fact to be true which was false, for then the judgment was valid, but subject to appeal (4).

(1) Page 57. When *existimatio* was very seriously impaired, the offender was said to incur *infamia*, in cases of less gravity, *turpitude*; if the offending person was in an inferior grade, he was branded with a *levis nota*.

(2) *Officium*, under the formula system, means the aggregate of the power and obligations of the *judex*.

(3) That is, according to the civil law, as contrasted with the prætorian law. For whatever might be the authority of the prætorian edicts, it was not incumbent on the *judex* (directly, at least) to pay any regard to them. A *judex* could not take into consideration any grounds resting on the prætorian law, or equity, unless he was specially authorized to do so by the terms of the formula. But he might apply the civil law without any such formal authority. Hence, when the formula merely contained these words, *si paret, dare oportere . . . si paret hanc rem esse Sempronii*, the question was to be decided by the principles of the civil law. When it was to be decided on other principles, the prætor drew up the formula *in factum*, or inserted an exception.

(4) The appeal had to be brought within the two days after the judgment given, or after the time when the party condemned knew of the judgment by default: and within three days if the party

Q. What form of judgment was the *iudex* required to give in *actiones noxales*, when he was of opinion that the master should be condemned?

§ 1. A. The *condemnatio* was in the alternative either to pay the *condemnatio* or to give up the slave or animal which had caused the damage; e. g., "I condemn *Publius Mævius* to pay *Lucius Titius* ten golden solidi, or to abandon the *noxæ*."

Q. What was the duty of the *iudex* in the action *in rem* (for the property)?

§ 2. A. If he pronounced against the demandant, he acquitted the possessor: if he pronounced against the possessor, it was his duty, before stating the *condemnatio*, to order him to restore the Thing forthwith (1), along with the fruits thereof, and other incidents (*accessoria*), i. e., with whatever the demandant would have had, if the thing had been given to him at the *litis contestatio*. But if the possessor alleged his inability to give up the thing immediately, and demanded time, the *iudex*, provided the demand appeared *bond fide* (*sine frustratione*), might grant the time, on receiving security by *fidejussor* (surety) sufficient to cover the value of the Thing in dispute, in case it should not be given up within the time limited.

Q. What were the fruits (*fructus*) to be accounted for by the possessor who had *condemnatio* awarded against him?

A. A distinction must be taken between the *bond fide* and the *malæ fide* possessor. The latter (*prædo*) was bound to account for all fruits gathered, and all that he had failed from negligence to gather. The former was bound to restore only such fruits as had not been consumed: he was not bound to account for fruits which had been gathered and consumed (2), nor for fruits which he had failed to

condemned had pleaded by *procurator*. By Nov. 23, Justinian allowed ten days. It seems that the appeal lay from the *iudex* to the prætor; thence to the senate, or, in later times, to the council of the emperor, with the prætorian prefect as head judge; finally to the emperor.

(1) In personal actions four months were generally allowed to the debtor to pay the amount of the *condemnatio*. The action of *vindicatio* is an *actio arbitraria* (B. 4, t. 6, § 31-2).

(2) Observe, it is not correct to say that the *bond fide* possessor gained the fruits; that would be at variance with many texts, particularly D. 12, t. 6, 15, by which it seems that a person who *bond fide* received a Thing not due was bound to account for all fruits

gather, at least before the *litis contestatio*; for, after action brought, all possessors are equal, that is to say, guilty of *mala fides*.

Q. In case of *petitio hæreditatis*, was it not the duty of the iudex to see that the *condemnatio* against the possessor included a return of the goods of the *hæreditas* and its fruits?

§ 2. A. Yes. Justinian says that, in regard to the *bond fide* possessor of an *hæreditas*, the same rules as to accounting for the fruits must be followed as in case of a claim by *vindicatio* for a particular Thing; but this was not so, at least after the passing of a Sc. on the proposal of Adrian (*post senatus consultum*, D. v. 3, 20, 6); for after it, the *bond fide* possessor of an *hæreditas* was bound to account for the fruits, even though consumed, so far, at least, as such possessor had derived profit thereby (1).

Q. Was the *mala fide* possessor of an *hæreditas*, like the *mala fide* possessor of a *res singularis*, bound to account for fruits consumed, or which such possessor had neglected to gather?

§ 2. A. Yes: Justinian says that in the *petitio hæreditatis* the fruits are to be accounted for by the *mala fide* possessor, on very nearly (*pene*) the same principles as in the *vindicatio* of a *res singularis*. The Emperor does not explain the difference alluded to by the *pene*; but it appears to be this: in the *petitio hæreditatis* the fruits gathered, or which the possessor had failed to gather, even before the *litis contestatio*, were necessarily comprehended in the claim, as constituting part of the *hæreditas* (*fructus augent hæreditatem*, D. 5, 3, 20, 31), and therefore formed part

gathered, and consequently for all fruits consumed. But the acquisition by the *bond fide* possessor of fruits consumed was a consequence of the particular action brought against him. For when the only possible action was a *vindicatio* it was only the fruits not consumed, which could be recovered *quia res extinctæ vindicari non possunt*. Whereas by the *condictio indebiti* the demandant might recover the value of the fruits consumed, because though non-existent things could not be claimed by *vindicatio*, they might be claimed by a personal action: *condicti tamen possunt* (p. 68). Thus, the reason why the *mala fide* possessor was bound to account for fruits consumed, or for those which he had neglected to gather, was because he was liable in a personal action—an action, however, which was not allowed against the *bond fide* possessor.

(1) It may be that this passage of Justinian (§ 2) is extracted from the writings of some jurist anterior to Adrian.

and parcel of the claim (1); whereas in *vindicating* a *res singularis* the fruits gathered, or which the possessor had failed to gather before the *litis contestatio*, were not necessarily comprehended in the demand, and could only be recovered by a special action, which was real, if the fruits were still in existence; and personal, if they had been consumed by the *mala fide* possessor.

Q. What was the duty of the *judex* when an action *ad exhibendum* was brought?

§ 3. A. If the *judex* pronounced against the defendant, he was to command him instantly to produce the Thing, with everything belonging to it (*etiam rei causam*); i. e., to put the demandant in possession of whatever he would have had if the thing had been produced at the very moment when the demand was made (2). It was his duty also to order the production of the fruits (*fructus*) gathered after the *litis contestatio* (*post acceptum iudicium*). But if the defendant made a *bona fide* demand for a reasonable delay, in order to enable him to produce it, it was the duty of the *judex* to grant such delay, provided the restitution of the thing was guaranteed. If the defendant did not produce the thing on the instant, according to the order of the *judex*, or if he did not give security (*cautio*) to produce it within the time allowed for that purpose, it became the duty of the *judex* to pronounce *condemnatio* against him for all the damage suffered by the demandant in consequence of the thing not having been produced at once.

Q. What was the duty of the *judex* in the action *familias erciscundæ* (for partitioning the *hereditas*)?

(1) For the *hereditas* was a *universitas*, which might be added to or diminished without ceasing to be the same. Hence, the *mala fide* possessor was bound to keep account, not merely of the price of the fruits consumed before the *litis contestatio*, but also of the interest of such price; for the price is *quid principale*, whereas in claiming a *res singularis* by *vindicatio*, the *mala fide* possessor was not liable for the interest accruing on the price of fruits gathered either before or after the *litis contestatio*, for such fruits are themselves accessories, and *accessionis accessio non est*.

(2) So that, says the text, if title by *usucapio* was perfected during the suit, the defendant would not the less be bound to restore the thing, for the title by *usucapio* was rescinded by the judgment. Thus, by the old law, at least, *usucapio* was not interrupted by the demand, whereas the *prescriptio longi temporis* ceased from the time, and by the mere effect of the demand being made.

§ 4. *A.* To adjudge to each hæres the separate things : and if any one hæres had more than his share adjudged to him, the judex was bound to condemn him to pay a certain sum to his cohæres. Again, it was the duty of the judex to pronounce *condemnatio* against that hæres who had gathered the fruits of the common undivided goods, or who had changed or destroyed the character of the things held in common, thus compelling such hæres to indemnify his cohæres. Again, it was the duty of the judex to condemn one hæres to indemnify his cohæres for sums expended by the latter on account of the common property of the hæreditas.

Q. Was it not the same in the action *communi dividendo* (for partitioning a Thing held in joint property) ?

§ 5. *A.* Yes : at least when there were several distinct things, or a single thing which might be conveniently divided between the coproprietors ; but when there was only a single thing which could not be divided with advantage—*e. g.*, a horse, or a slave held in joint property—the judex might adjudge it entire to one of the coproprietors, at the same time condemning him to pay to the others a certain sum by way of balancing the account (1).

Q. What was the duty of the judex in the action *finium regundorum* (fixing the boundaries) ?

§ 6. *A.* To examine whether the adjudication was imperatively required ; which was only in one case, *viz.*, when it was found requisite to mark out the lands by more definite boundaries : in such case the judex had to adjudge to the proprietor of one of the (*heritages*) estates a portion of the land belonging to the other (2), condemning the person to whom the land was adjudged to pay to his neighbour a certain sum as compensation. By the same action a party was condemned who had fraudulently interfered with the boundaries ; *e. g.*, by the removal of stones or the cutting down of trees which served as boundaries. By the same action a man might be condemned for unlawful resistance (*contumaciæ*), as where, in spite of

(1) The same held good in a case of *petitio hæreditatis*, if, as was not very often the case, the hæreditas comprised only one indivisible thing.

(2) Thus, for instance, the judex might adjudge to me a portion of my neighbour's land, in order that my land might extend to a stream or public road, so as to form a clearer or more natural boundary.

the order of the *judex*, he refused to allow the land to be measured or surveyed.

Q. What was the effect of *adjudicationes* or judgments pronounced by the *judices* in the three actions *familiæ erciscundæ*, *communi dividundo*, *finium regundorum*?

A. The effect was to transfer immediately the property to the person in whose favour the adjudication was made (1).

TITLE XVIII.—OF JUDICIA PUBLICA.

Q. WHAT do you understand by *judicia publica*?

§ 1. A. They are criminal prosecutions, which every citizen (2) is allowed by law to institute against any person who has been guilty of a wrongful act, in order that the penalty fixed by the law to such act may be inflicted upon him.

Q. Are the proceedings in *judicia publica* conducted like ordinary suits?

A. No: the procedure is not by *action*, but by accusation and *inscriptio* (3).

Q. How were *judicia publica* divided?

§ 2. A. Into *capital* and *non-capital*. The first were

(1) These three actions must therefore be personal, not real, for the demandant claims to have certain property *transferred* to him, which rests on the hypothesis that he is not proprietor. In truth the claimant exchanges his undivided share in the whole for a specific and definite portion.

(2) *Plerumque datur, i. e.*, unless excluded by some law; *e. g.*, women, unless the injury was done to themselves, or their near relations; persons under age, or *infamous*, or not possessing fifty *aurei*.

(3) The prosecutor of a public wrong (*delictum*) sent to the magistrate, who had cognizance thereof, a written document, in which he named himself accuser, and declared his readiness to submit to the penalty of the *lex talionis*, if he should be convicted of *calumnia* (false accusation). The cognizance of *judicia publica* did not belong to the prætors: by the pandects it devolved on the *præfectus urbi* and the governors of the provinces. Under the Republic it passed into the hands of different magistrates: but the people themselves took cognizance when the life of a citizen was in question.—Observe, *judicia publica* were properly the trials conducted under the provisions of special laws, which prescribed the mode of trying a crime and the penalty attached to it.

those involving natural or civil death (B. 1, t. 3); the second those which, besides *infamia*, involved only a pecuniary and corporeal penalty, without deprivation of the rights of liberty or citizenship.

Q. Mention the laws authorizing *judicia publica*.

A. 1. *Lex Julia Majestatis*; 2. *Lex Julia de Adulteriis*; 3. *Lex Cornelia de Sicariis*; 4. *Lex Pompeia de Parricidiis*; 5. *Lex Cornelia de Falsis*; 6. *Lex Julia de vi Publica vel Privata*; 7. *Lex Julia Peculatus*; 8. *Lex Fabia de Plagiariis*; 9. *Lex Julia de Ambitu*; 10. *Lex Julia Repetundarum*; 11. *Lex Julia de Annona*; 12. *Lex Julia de Residuis*.

Q. What crimes were punished by the *Lex Julia Majestatis*?

§ 3. A. Crimes of high treason and *læsæ majestatis*. A person convicted of having contrived aught against the emperor or against the state was punished with death: his memory was condemned even after his death.

Q. What crimes were punished by the *Lex Julia de Adulteriis*?

§ 4. A. This law, passed B.C. 167, punished with death not merely those who defiled the bed of another, but those who committed abominable crimes. Moreover, it punished *stuprum*, when a girl or honourable widow was seduced without violence. The penalty was confiscation of half the goods of seducers in the higher ranks, and in those of the lower ranks corporal punishment, accompanied with *relegatio* (B. 1, t. 16).

Q. What punishments were inflicted by the *Lex Cornelia de Sicariis*?

§ 5. A. This law, passed B.C. 80, punished with death assassins (*sica; dagger*), and those who carried any weapon for the purpose of vengeance. The same law punished with death poisoners, who, by their horrid machinations, put men to death either by poison or by magic charms, or who publicly vended dangerous drugs (§ 5).

Q. Explain the *Lex Pompeia de Parricidiis*.

§ 6. A. This law, passed B. C. 52, inflicted a novel punishment upon him who, either clandestinely or openly, put to death his father or mother, his son, or any relation (*affectionis*), whose murder would be parricide (c. ix. 17) (1).

(1) *I. e.*, the murder of any ancestor or husband or wife, of *oposobrii*, of a step-father or mother, father-in-law, &c., of a patron, and of a child if killed by the mother or grandfather, but not by the father (D. 48, 9, 1).

Moreover, the penalty denounced against parricides was inflicted on him by whose fraud the crime had been committed, or who had taken part in it, though not a relation of the deceased. The punishment consisted in the culprit being inclosed in a leathern sack with a dog, a cock, a viper, and a monkey, and thus thrown in the sea, or into the nearest river. If the sea or river was too far off, the parricide was burnt alive, or abandoned to the fury of wild beasts (D. 48, 9, 9).

Q. What crimes were punished by the *Lex Cornelia de Falsis*, or *Testamentaria*?

§ 7. A. It denounced punishment against any one who wrote, sealed, read, or substituted a false testament, or any other instrument, or who made, cut, or impressed a false seal knowingly and wilfully. In case of slaves, the extreme penalty was incurred; in case of freemen, *deportatio* (1).

Q. What punishments were inflicted by the *Lex Julia de vi Publica seu privata*?

§ 8. A. By it *public* violence was punished by *deportatio*; *private* violence by the confiscation of a third of the goods. Justinian decreed that persons convicted of having violated a maid, a widow, a nun, or any other woman, should be punished with death, as well as their accomplices.

Q. Explain the *Lex Julia Peculatus*.

§ 9. A. It denounced *deportatio*, and sometimes the *pœna quadrupli* (D. 48, 13, 1, 3), against those who stole public money, or anything *sacrum* or *religiosum* of which they had the control. Capital punishment was denounced against public officers and their accomplices who were found guilty of such peculation (C. 9, 28).

Q. What punishment was inflicted by the *Lex Fabia de Plagiariis*?

§ 10. A. Any *plagiarius*, i. e., any man who knowingly

(1) This law (a. c. 80) gave rise to the fiction, that a man who had died in captivity, died at the very moment he was taken captive (p. 129). For the law attached the same penalty to forging the testament of a man dying in captivity, as to forging the testament of a man dying in his own country. Hence it was said that the law clearly considered a captive's testament valid: but that could only be so by supposing the testator to have died at the moment of his captivity, for no testament was valid unless the testator had power to make it, both at the date when he did so in fact, and at the date of his death. Therefore he must be supposed to have died when he was taken captive: and this was called the *beneficium legis Corneliae* (D. 48, 15, 18.)

kept in irons, or confined, sold, gave away, or bought a citizen (whether freeman or freedman), or the slave of another, was by this law condemned to pay a money penalty, which the Constitution afterwards changed into capital punishment.

Q. Explain the laws *Julia de Ambitu*, *Repetundarum*, *de annona*, and *de residuis*?

§ 11. A. The first punished those who endeavoured to corrupt the votes at popular elections; but its provisions became obsolete in Rome when the Emperor himself filled up the various offices; but in the provinces, where the citizens continued to elect the magistrates, it continued in force. The second (*repetundarum*) was made in Julius Cæsar's time, to punish magistrates and judges for receiving bribes. The third (*de annona*) was made to punish combinations to raise the price of provisions. The fourth (*de residuis*) was made to punish those who failed to account for or embezzled the public moneys.

APPENDIX.

ON THE TUTELA OF WOMEN (P. 39).

THIS species of guardianship, though omitted by Justinian, is explained by Gaius. According to him (1. § 144), the old Romans considered that women even of full age should be kept in *tutela*, on account of the weakness of their understanding. It was only women *sui juris*, however, who needed this protection; for the rest being *alieni juris*, were in the *potestas* of a pater-f., or the *manus* of a husband, or in *mancipio*. Now tutors were nominated for women by testament, by the law, or by a magistrate: 1. By *testament*; when a pater-f. named one for his daughter or daughter-in-law in *manu filii-f.* But in such cases it was an essential condition that the woman should be *sui juris* at the testator's death. Moreover, a husband might give his wife the right to select her own tutor: *tutoris optionem do*. 2. By the law; when women had no tutors by testament, but were *freeborn*, and therefore had their *agnati* for tutors, or were *freedwomen*, and therefore had their patrons and their patrons' children for tutors. Such tutors were called *legitimi*, because they derived their existence directly or indirectly from the XII Tables (p. 45). Again, when a man, having received a woman in *mancipio* (p. 36), enfranchised her, and so became her tutor, he was called a tutor *fiduciarius*. So also when a woman's ancestor by *mancipatio* and *re-mancipatio* (solemn sale and re-sale), acquired the woman in *mancipio* and then enfranchised her, he became in strictness her tutor *fiduciarius*, but by courtesy he was called *legitimus*.—But the peculiarity about the tutela of women was this, that the *agnati*, or the *patron*, or his children, might resign the office by assigning it to another—which the tutor of a male pupil never could. The new tutor was called *cessicius*, because the assignment was made in court in *jure-cessio*; but on the death of the assignee he was replaced by the assignor. 3. By a magistrate, according to the *lex Atilia*, when a woman had no tutor testamentary, *legitimus*, or *fiduciarius*.—The tutela of women (except in case of Vestals) was perpetual; nevertheless, it ceased when a woman lost her liberty or citizenship, or became *alieni juris*, by coming in *manu viri*.—Such was the old law. But under the Republic, the only tutors who exercised real power over women were the *tutores legitimi*; for, being *agnati*, or *pa-*

trons, or *emancipating ancestors*, they had a presumptive interest in the property of their female wards: in other cases women managed their own affairs, and the interference of the tutor was merely formal (*dicis causæ*).—But a woman might get rid even of a tutor *legitimus* thus: with his consent, she made a feigned sale of herself to a third party (*coemptionem facere*): he enfranchised her, or re-sold her to her original tutor, or to a fourth, who enfranchised her. Thus being freed by the sale from the real control of a tutor *legitimus*, she became thenceforth subject to the mere formal power of a tutor *fiduciarius*.—But as early as the *lex papia poppæa* (a) it was decreed that *ingenue* with three children should be free from *tutela legitima*, and freedwomen from other tutela. A.U.C. 798, the *lex Claudia* abolished the tutela of *agnati* over women generally, so that the tutela of *ancestors* and *patrons* alone remained. This was the law in Gaius' time; and though the right continued in Ulpian's time, it gradually became obsolete, though we can point to no law expressly abolishing it.

(a) The privilege allowed by this law to those who had children was sometimes called the *jus liberorum*. Vide pp. 180, 210.

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ERRATA.

Page 11, line 3, *vicarii*, see page 174 note; note line 9, insert "either" before "the jus."

- „ 49 „ 20, for 7 read 8; line 22, for "as" read "from."
- „ 83 „ 22, for "fundi" read "ferendi."
- „ 85, note, transpose "obligor" and "obligee."
- „ 95, line 1, for "grantor" read "grantee."
- „ 115 „ 3, for "17, 18," read "27, 28."
- „ 139, note, in "sextrans" dele "r."
- „ 157, line 12. for "substituti" read "instituti."
- „ 181, the first line of the note refers to "tabulas," line 8: the rest to (1).
- „ 219, line 26, for "succeeding" read "freedmen's successors."
- „ 257 „ 22, for "and" read "or."
- „ 259 „ 15, dele "so might" and insert "for."
- „ 267 „ 14, after "one" insert "or generally where one undertook the debt of another, Gaius 3, § 130."
- „ 324, note, line 4, dele comma after "right."
- „ 384, line 21, for "hæreditas" read "hæreditatis."

